IN THE
SUPREME COURT OF MISSOURI
No. SC93855

STATE OF MISSOURI,

Respondent,

vs.

DAVID RUSSELL HOSIER,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19TH JUDICIAL CIRCUIT, COLE CO. NO. 09AC-CR02972-01
THE HONORABLE PATRICIA S. JOYCE, JUDGE

APPELLANT'S BRIEF

Craig A. Johnston, MOBar #32191
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7 Suite 100
Columbia, Missouri 65203
(573) 777-9977
Fax (573) 777-9963
Email: Craig.Johnston@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***RULES*:**

***MISCELLANEOUS*:**

JURISDICTIONAL STATEMENT

Appellant, David Hosier, was convicted after a jury trial in Cole County, Missouri of murder in the first degree, ***§ 565.020***, armed criminal action, ***§ 571.015***, burglary in the first degree, ***§ 569.160***, and unlawful possession of a firearm by a felon, ***§ 571.070, RSMo Supp. 2009***.[1] As to the first-degree murder conviction, he received a sentence of death (LF412; 533-34). Thus, this Court has exclusive appellate jurisdiction of this direct appeal. Art. V, Sec. 3, Mo. Const. (as amended 1982).

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

STATEMENT OF FACTS

David Hosier lived in an apartment building on West Main Street in Jefferson City, Missouri, and Angela Gilpin lived in a nearby apartment building on West High Street (Tr.843-84). The buildings were separated by a parking lot (Tr.848). Dennis Prenger owned both of the buildings (Tr.843-84).

David and Angela became involved in an on-again, off-again affair during 2008-2009 (Tr.782-83, 787-89, 803, 807, 816, 828-29, 865-66). But in July or August, 2009, Angela decided to stay with her husband Rodney Gilpin (Tr.789-90, 817, 828, 877).[2] David was upset and said that if he could not have Angela, then nobody would (Tr.789-90, 817, 828, 877). He said that if she "would not come back with him" then he "would put a stop to it somehow" (Tr.790).

Around August, Angela called Prenger and told him that David had entered her apartment, so she was changing the dead bolt lock on her door (Tr.852, 866-68, 871).[3] Prenger spoke with David (Tr.854). David told him that Angela had given him the keys to her apartment (Tr.854, 868). He had used keys to enter Angela's apartment to take a gun away from her after she threatened to kill herself

[2] Further dates are to 2009 unless otherwise noted. David will reference Angela and Rodney by their first names for clarity since they share the same last name. No disrespect is intended.

[3] David renewed a previous objection to hearsay statements made from Angela, and the trial court allowed a continuing objection (Tr.852-53).

(Tr.869). He gave the keys to Prenger so that they could be returned to her (Tr.854, 868).[4] David no longer had Prenger's permission to enter that building (Tr.855). Prenger also removed David's numeric code to the keypad of a storage room (Tr.854-55, 869, 871).[5]

Around the middle of September, David told Steve Armstrong that Angela wanted to go back to Rodney (Tr.781-82). Armstrong told him to "let her go" because she would never leave Rodney (Tr.781, 783). David was also upset because he had received a restraining order and an eviction notice for his apartment (Tr.781-82). David said he was going to move away (Tr.782).

About a week later, David told Jodene Scott, a neighbor, who lived in the same apartment building as Angela, that he was upset because Angela would not talk to him (Tr.823-25, 834, 1045). He might have told Scott that he was tired of "getting blamed for shit" (Tr.823-25, 834).

Around September 21, Prenger received a letter from Angela (Tr.856-857; State's Exhibit No. 199-A).[6] In that letter, Angela indicated that she was afraid of David and that she had filed a restraining order against him (Tr.857). She requested another apartment (Tr.857). Prenger also learned from Scott that David

---

[4] There was also a separate key to the apartment building (Tr.855).

[5] David had done some work at the apartment buildings for Prenger (Tr. 853, 869-70).

[6] David objected to the letter (Tr.856).

had a 1993 felony conviction from Indiana, so he called David on September 22 (Tr.775-76, 858-59, 1297, 1309-10, 1315-16; State's Exhibit No. 280-A). Prenger told David that he had learned about David's prior conviction and requested that David move out by the end of the month (Tr.859). The next day, Prenger wrote to Angela that he had asked David to be out of his apartment by the end of the month, and he asked Angela to stay (Tr.857-58).

On September 25, David called Prenger and asked if he could remain since Angela was going to move out (Tr.860). Prenger told him that he still had to move out (Tr.860).

On September 27, Geralyn Bleckler received several voicemails from David (Tr.791). He wanted to know if she had talked to Angela about Rodney (Tr.791; State's Exhibit No. 10). Later that night, David called Bleckler and told her that he knew that Bleckler was not going to try to get Angela and David back together again (Tr.792). Bleckler told David to leave Angela alone because Angela and Rodney were going to remain together and that Angela did not want to have anything to do with David (Tr.792). David called again, but Bleckler allowed the calls to go to voicemail (Tr.792).

Also on September 27, shortly before 10:00 p.m., Scott received a phone call from David (Tr.819-20). David wanted to go to Scott's apartment to give her something (Tr.820-21). When Scott said that she was too tired, David said he would leave on her car some keys and instructions about taking care of his

belongings if anything happened to him (Tr.821, 1049-50). He mentioned that he was going to "eliminate his problems" (Tr.824, 1052).

Sometime around 3:00-3:30 a.m. on September 28, a woman who lived in the same apartment building as Angela, was entering that building when she saw two bodies on the floor (Tr.762-64). She saw the bodies after she had used a key to enter the common area of the apartment building (Tr. 764). She called 911 (Tr.764, 941). Other neighbors had heard "pops, like gunfire" between 3:15-3:30 a.m. (Tr.767, 769, 771).

When officers responded to the crime scene shortly after 3:30 a.m., they saw Angela lying partially in the open foyer and partially in her apartment with 9-millimeter shell casings in the foyer and another one in her apartment (Tr.941-44, 946, 949-50, 960, 962-63, 973-74, 991-93, 996, 1016-17, 1041-42). Angela was dead; she had been shot several times (Tr.942, 975-76).[7] Rodney had also been shot to death and was lying near Angela but he was inside the apartment (Tr.949, 960, 962-63, 968, 971-72, 986, 1017).

[7] An autopsy revealed that Angela died from four gunshot wounds to her torso and two to her head (Tr.1325, 1327-28, 1330-31, 1339-40). There was no evidence of any shoot or stippling, which could indicate that the gun had been at least 12-24 inches away (Tr.1334-35, 1347, 1350-51, 1353). Two bullets were recovered from the autopsies (Tr.1034-36).

The door to the building was locked and there were no signs of forcible entry (Tr.944-45). There were bullet holes in a wall to the right of the entry door and in the doorway leading into the victims' apartment (Tr.950, 963-64, 967-68). 977, 981). Officers found several projectiles in various locations at the crime scene (Tr.974, 976-77, 979, 993-94). In Angela's purse were a .38 handgun and a petition for an order of protection filled out by Angela against David (Tr.979-80, 987-88; State's Exhibit Nos. 57 and 200).

Armstrong heard about the double homicide, so he drove to the apartment building (Tr.777). The police had barricaded the streets (Tr.779). Armstrong told the police that David could be heavily armed; Armstrong had seen several weapons in David's apartment after he helped David move from Indiana sometime between 2004-2007 (Tr.780). Prenger also spoke with the police and told them that Angela had problems with David (Tr.862). Prenger gave them copies of the letter that Angela had written to him and a national criminal check that Prenger had run (Tr.862).

Officers retrieved some voicemail messages David had left on Bleckler's phone (Tr.792-802, 1043-44; State's Exhibit Nos. 10, 12, 198). One of them said, in part:

> I told you to tell her to get her fuckin ass out of my sight for good. Get the fuck away from here. Move back with fuckin Rodney. Get out of that god damn apartment. You didn't tell her that. I'm gonna fuckin finish it. I'm tired of the shit. You don't believe me. I'm tired of the shit.

(State's Exhibit No. 12).

At about 7:00 a.m., officers contacted Scott (Tr. 1046). She told them about the phone call she had received from David the night before (Tr.1047). Scott also mentioned that the Thursday before the murders, David had told her that Angela had "fucked him over" and that he was going to "fuck her over" (Tr.826, 834, 1053).

On Scott's car, officers found a note along with a key ring with a set of keys (Tr.956-58, 990; State's Exhibit Nos. 14-18). The note requested that Scott call one of David's sisters if anything happened to him (Tr.959).

Jefferson City police officers obtained search warrants for David's apartment, Angela's apartment and a phone ping order for David's cell phone (Tr.1018-19). At about 8:15 a.m., officers searched David's apartment (Tr.1019-20, 1026).[8] No one answered the door, and the officers gained entry using a key provided by Prenger (Tr.1019-20). Inside the apartment was a gun safe, which contained some ammunition including 9-millimeter ammunition, a receiver for a long gun, and an owner's manual for a rifle (Tr.1020-23, 1025-27, 1029, 1031). An empty 9-millimeter box of shells was on top of the safe (Tr.1021, 1026, 1029, 1031). Inside a wooden chest was a schematic or paper template for a STEN 9-millimeter submachine gun, which could be used to make a weapon that would

[8] David renewed his objection to the search, and he was allowed a continuing objection (Tr.1031).

fire 9-millimeter ammunition (Tr.1021, 1023, 1026-28, 1030, 1039, 1303, 1305-06). On top of the kitchen trash can were two empty packages for speedloaders for .38 Special and .357 revolvers; speedloaders allow the rapid loading of ammunition into a weapon (Tr.1021-22, 1025, 1027-1028). In the common living area was a plastic bag containing some spent ammunition (Tr.1038). Officers did not find a 9-millimeter handgun (Tr.1039).

Around 9:45 a.m., the Oklahoma Highway Patrol received information from the Jefferson City Police Department about a "wanted car and person" (Tr.899, 927). The last location that they had for David as a result of the ping order was in the Kansas/Oklahoma area (Tr.899).

Oklahoman officers began pursuing David near Tahlequah, Oklahoma (Tr.899-901). It was a "moderate-speed" pursuit, which was around the speed limit (Tr.920, 932-33). During the pursuit, one law enforcement vehicle partially blocked the road, but David went around it and continued to drive southbound (Tr.921-22).

Between 10:30-11:00 a.m., David stopped his car (Tr.923, 927). When David exited his vehicle, the officers commanded him to get on the ground, but David ignored the commands and said, "Shoot me, and get it over with" or "end it" (Tr.924). They were eventually able to handcuff him (Tr.924-925). Among the items he had on his person was a knife (Tr.928-29).

Jefferson City officers flew to Tahlequah, Oklahoma, where David's car was being held (Tr.1054). The officers searched the car after getting a search warrant (Tr.1054-55).[9]

In the front passenger compartment, officers found a STEN submachine gun, three other firearms, a fully loaded magazine that would go to the STEN, two speedloaders for a .38 revolver, an ammo can with about 400 rounds of ammunition, a homemade police baton, two cell phones, a green duffel bag, and a handwritten note (Tr.1066-68, 1070-71, 1076, 1078, 1086-87, 1096, 1108, 1114-1115). The note read:

> If you are going without [sic.] someone, do not lie to them, do not play games with them, do not fuck them over by telling other people things that are not true, do not blame them for things that they have not done. Be honest with them and tell them if there is something wrong. If you do not, this could happen to you. People do not like being fucked with, and after so much shit they can go off the deep end. Had to [sic] much shit!!!

(Tr.1056-61, 1067, 1081-82; State's Exhibit Nos. 104 and 223).

Among the items in the green duffel bag found in the passenger compartment were: a pistol holder, 12 or 14 magazines, a bandoleer with ammunition in it, a "leather sleeve with magazine and ammo," two clips, and 17

[9] David renewed his motion to suppress and objection to items seized from the car and was allowed a continuing objection (Tr.1055-56, 1090, 1093, 1096, 1115).

boxes and one bag of ammunition (Tr.1069-70, 1076-78, 1087-89). The ammunition were: .38 special, 30-06, Winchester shotgun 12-gauge, Winchester shotgun 16-gauge, Remington 16-gauge shotgun, 30 carbine, 16-gauge shotgun shells, .22 long rifle, 308 Winchester rifle rounds, .410 shotgun shells, .22 shells, and .32 automatic (Tr.1091-94). The magazines were fully loaded with about 30 rounds (Tr.1077). One magazine seized from David's car could hold 33 bullets, and it contained 21 live rounds (Tr.1189).

A knife was found on the driver's side between the door and the seat (Tr.1082). In the back seat was a bulletproof vest or body armor (Tr.930, 1072, 1102-03). Under a blue blanket in the rear seat were two loaded rifles and a loaded shotgun (Tr.1073). In the trunk of the car were some clothing, an ammo can, and another green duffel bag (Tr.1074, 1109). Inside that duffel bag were eight long guns (Tr.1074-1075).

Aside from the STEN, there were a total of 14 other guns in the car: High Standard .22 revolver; 1910 .32-calbier pistol; Smith and Wesson .38 Special; Remington model 742; Ithaca .22 lever action; Stevens model 59A; LC Smith side-by-side shotgun; SKB 12-gauge shotgun; Stevens .22; Springfield .22 automatic; unknown make rifle with scope; Mosin Nagant rifle; US Springfield model 1903; Remington model 03-A3 (Tr.1055-56, 1083-84; State's Exhibit Nos.

225-238).[10] There was no 9-millimeter handgun (Tr.1144). But the STEN machine gun could fire 9-millimeter ammunition (Tr.1150). All of the weapons were loaded except for the STEN submachine gun (Tr.1067, 1097-1101).

Missouri State Highway Patrol criminalist Evan Garrison examined the shell casings and bullets seized from the crime scene and autopsy and compared them to the 9-millimeter STEN submachine gun seized from David's car (Tr.1184, 1185-87, 1191, 1202-1218). The firearm did not fire reliably or consistently (Tr.1265). Garrison had to repeatedly pull out the gun's magazine and shake a bullet out when it failed to detonate (Tr.1265-1266). It took Garrison several attempts before he got the gun to fire (Tr.1266).

There were nine 9-millimeter caliber expended cartridge cases found at the murder scene that could have been fired from the STEN, but because of the lack of the presence of individual characteristics, Garrison could not be certain that they were fired form the STEN (Tr.1204-05). Based upon extractor and ejector marks found on some of the cartridges, Garrison could say to a reasonable degree of scientific certainty that some of the cartridge cases had been *extracted or ejected*

[10] David objected to the State presenting evidence about the other guns found in David's car (Tr.1059-60, 1084-85; State's Exhibit Nos. 103, 108-10, 123, 125, 126, 132, 133). The trial court overruled the objections and allowed a continuing objection (Tr.1061, 1063).

from that firearm (Tr.1205-12; State's Exhibit Nos. 58, 158, 159). He could not say, however, that they had been *fired* from that firearm (Tr.1293-94).

When Garrison examined some of the unknown expended bullets, he found that they possibly had been fired from that submachine gun, but it did not rise to a level of identification (Tr.1214-19, 1270-71). He could not say to a degree of reasonable scientific certainty that those bullets were fired from the STEN machine gun (Tr.1215, 1218-19).

Officers obtained a search warrant for David's storage shed in Holts Summit (Tr.1110, 1153).[11] Among the items in the shed were ammo cans, ammunition, two stocks for a STEN gun, magazines that appeared to be consistent with the STEN gun, bandoleers that contained live ammunition, and shell casings (Tr.1111, 1117-21, 1123-24, 1308-09). No 9-millimeter weapon was found in David's apartment or storage shed (Tr.1311).

After David was incarcerated, a fellow inmate claimed that David said he had been "done wrong" by his girlfriend and that he was capable of killing somebody; but David did not admit that he had killed anybody (Tr.1159-60, 1175).

[11] David renewed his motion to suppress, and the trial court overruled the objection but allowed a continuing objection (Tr.1110). David's relevancy objection was also overruled (Tr.1112).

Procedural and Evidentiary Matters

David was indicted in Cole County, Missouri, for murder in the first degree, ***§ 565.020***, armed criminal action, ***§ 571.015***, burglary in the first degree, ***§ 569.160***, and unlawful possession of a firearm by a felon, ***§ 571.070, RSMo Supp. 2009*** (LF24-26).

Prior to trial, David moved to exclude the letter written by Angela to Prenger a week before her death (LF191-92). The letter mentioned, among other things, that Angela had filed for a restraining order, that she was afraid of David, and that she did not "know what he will do next" (LF191-92; State's Exhibit No. 199A). The State argued that the letter was admissible under the "forfeiture by wrongdoing" doctrine and it was relevant to show her "fear of who is going to kill her" (Tr.127).

At trial, David continued to object to the letter and other statements made by Angela to witnesses, and the trial court ruled that the State could introduce into evidence a redacted copy of that letter (Tr.734, 836-840; State's Exhibit No. 199-A). David objected to the redacted letter (Tr.839-41). The trial court overruled the objection and allowed a continuing objection (Tr.841-42).

David filed a pretrial motion to suppress physical evidence, including any evidence seized from him, his vehicle, his apartment, and his storage shed (LF138-

141). After a hearing, the trial court overruled the motion to suppress (LF12).[12] At trial, David renewed his objection to all the searches that occurred (Tr.751, 1031, 1055-56, 1090, 1093, 1096, 1110, 1115).

David moved for judgment of acquittal at the close of the evidence; his motion was overruled by the trial court (LF326-27; Tr.1384-87). Subsequently, the jury found David guilty of the charged offenses (Tr.1439-40).

During the penalty phase, the State presented: victim impact evidence through testimonies from Angela's mother and two adult children (Tr.1574-1579); evidence that David had assaulted an ex-wife in 1986 and violated an order of protection involving her (Tr.1464-67, 1482-83); and, that in 1992, he assaulted a former girlfriend by handcuffing her and hitting her face until she was unconscious (Tr.1514-18, 1521-31). Regarding the 1992 assault, David was convicted of battery and sentenced to eight years in prison (Tr.1517-18, 1521; State's Exhibit No. 280-A).

There was also evidence that in 1986 David told former prosecutor's investigator Richard Lee that he was upset about how the Sheriff's Department was attempting to serve him with "civil process" (Tr.1485-88, 1492-94). Shortly thereafter, Lee learned that an order had been issued for a 96-hour commitment for a mental evaluation for David (Tr.1487-88). Lee and another deputy attempted to

[12] David has set out the evidence presented at that hearing in his argument portion of the brief. He has not repeated here to avoid needless repetition.

serve David with the commitment order (Tr.1487-88, 1491, 1505-06, 1508). The deputies had to negotiate with David for about four hours before he would come out of his residence (Tr.1489-91, 1509-11). When David came outside, Lee tackled David, and he was taken into custody (Tr.1490-92, 1512-13).

In about 2004 or 2007, David was staying in a camper on a couple's property when he was going through a divorce (Tr.1536, 1604). David talked about killing his soon-to-be ex-wife (Tr.1537, 1570 1572, 1622). Later, when the couple asked him to leave their property, he threatened the husband with a handgun (Tr.1538-40, 1562).

In mitigation, David presented a video deposition of his mother (Tr.1580, Defendant's Exhibit FF); testimony from one of his sisters, who recounted how their father, a highway patrolman, had been killed in the line of duty when David was fifteen or sixteen years old (Tr.1624-1637); testimony from a pastor who met David after he was incarcerated (Tr.1588-95); and testimony of the ex-wife of the man at whom David had pointed the gun in 2004 or 2007 (Tr.1601-23).

The jury recommended a sentence of death after finding two statutory aggravating circumstances: 1) David had a serious assaultive conviction in that he was convicted of battery on March 17th, 1993, in the Circuit Court of Cass County, Indiana, because David beat Nancy Marshall about the face while she was handcuffed; and, 2) Angela's murder was committed while David was engaged in the commission of another unlawful homicide (Rodney) (Tr.1672; LF 412).

In David's motion for new trial, he alleged, in part, that the trial court erred when it: overruled David's continuing objections and allowed introduction of testimony, photographs, and physical evidence of items unlawfully seized from David's apartment, David's car, and David (LF430-33); overruled his objections to hearsay statements made by Angela and the letter written by her to Prenger (LF421-26, 434-35); overruled his objection to the *ex parte* petition for order of protection found in Angela's purse (State's Exhibit No. 200) (LF438); overruled David's objections to firearms and ammunition found in David's car that were not connected to the charged murders (LF447-48); and, overruled the motion for judgment of acquittal at the close of all the evidence as to the burglary count because there was no evidence presented that David, or anyone else, unlawfully entered the apartment common area (LF454-55).

On November 26, 2013, the trial court overruled David's motion for new trial and sentenced him to death according to the jury's recommendation (Tr.1681, 1692-93; LF533-34). The trial court also sentenced David to terms of imprisonment of fifteen years for armed criminal action and burglary and seven years for unlawful use of a weapon (Tr.1693-94; LF533-34). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINTS RELIED ON

I.

The trial court erred in overruling David's Motion to Suppress Physical Evidence and in admitting into evidence items seized from his car, and all testimony concerning that evidence, because this violated David's right to be free from unreasonable searches and seizures as guaranteed by the 4th Amendment to the U.S. Constitution and Article I, § 15 of the Missouri Constitution, in that the Missouri ping order that was obtained to locate David, which resulted in officers finding, stopping, and arresting David in Oklahoma, was not based upon probable cause because the affidavit supporting the application for that order merely asserted that David had "been identified as the primary suspect in the homicide investigation" without any factual support for that conclusory assertion; and all evidence seized as a result of the ping order and David's subsequent detention were fruits of this poisonous tree. Further, the good faith exception is inapplicable because the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

United States v. Powell, 943 F.Supp.2d 759 (E.D.Mich. 2013);

In Re Application of U.S. for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone, 849 F.Supp.2d 526 (D. Md. 2011);

United States v. Jones, 132 S.Ct. 945 (2012);

State v. Earls, 214 N.J. 564, 70 A.3d 630 (2013);

U.S. Const., Amend. IV;

Mo. Constitution, Article I, §15; and

Rule 29.11.

II.

The trial court erred in overruling David's Motion to Suppress Physical Evidence and in admitting into evidence items seized from his car, and all testimony concerning that evidence, because this violated David's right to be free from unreasonable searches and seizures as guaranteed by the 4th Amendment to the U.S. Constitution and Article I, § 15 of the Missouri Constitution, in that the Oklahoma officer who activated his emergency lights and ultimately stopped David's car had not observed any traffic violation prior to activating his emergency lights, rather he was only stopping David at the request of Missouri officers who did not have probable cause to request Oklahoma officers to take David into custody so that Missouri officers could question him; all evidence seized from David and his car following this unlawful detention and seizure was fruit of the poisonous tree; David was prejudiced because one of the items seized was a submachine gun that was later identified by a highway patrol criminalist as being the gun that extracted or ejected the shell casings found at the murder scene, which was the only evidence placing David at the scene of the murders.

United States v. Mendenhall, 446 U.S. 544 (1980);

State v. Bergerson, 659 N.W.2d 791 (Minn.App. 2003);

State v. Randolph, 74 S.W.3d 330 (Tenn. 2002);

State v. Oquendo, 223 Conn. 635, 613 A.2d 1300 (1992);

U.S. Const., Amend. IV;

Mo. Constitution, Article I, §15; and

Rule 29.11.

III.

The trial court erred in overruling David's Motion to Suppress Physical Evidence and his objections during trial to the introduction of evidence seized from his apartment as the result of the execution of a search warrant, because this denied David his right to be free from unreasonable searches and seizures, as guaranteed by the 4th and 14th Amendments to the United States Constitution and Article I, § 15 of the Missouri Constitution, in that the affidavit used to obtain the search warrant for David's apartment did not establish probable cause that there was a fair probability that contraband or evidence of a crime would be found in the apartment.

State v. Hammett, 784 S.W.2d 293 (Mo.App.E.D. 1989);

State v. Gordon, 851 S.W.2d 607 (Mo.App.S.D. 1993);

Illinois v. Gates, 462 U.S. 213 (1983);

U.S. Const., Amends. IV and XIV;

Mo. Constitution, Article I, §15; and

Rule 29.11.

IV.

The trial court abused its discretion in overruling David's objections and allowing the State to parade testimony and evidence concerning numerous weapons and ammunition unrelated to the murder for which David was being tried, because this denied David his rights to due process, a fair trial, and to be tried for the offense with which he is charged, as guaranteed by the 6th and 14th Amendments to the United States Constitution and by Article I, §§ 10 and 18(a) of the Missouri Constitution, in that these weapons and ammunition were not directly connected to the murder, were inherently prejudicial, and had no probative value since they could not assist the jury in deciding any of the issues presented in the case because the evidence was uncontroverted that the murder weapon fired 9-millimeter ammunition, and thus David's possession of weapons and ammunition that could not have been involved in the murder were neither logically nor legally relevant and served only to color David's character as someone tending to possess dangerous weapons.

State v. Holbert, 416 S.W.2d 129 (Mo. 1967);

State v. Krebs, 106 S.W.2d 428 (Mo. 1937);

State v. Anderson, 76 S.W.3d 275 (Mo.banc 2002);

State v. Wynne, 353 Mo. 276, 182 S.W.2d 294 (1944);

U.S. Const., Amends. VI and XIV;

Mo. Constitution, Article I, §§10, 18(a); and

Rule 29.11.

V.

The trial court erred in overruling David's objections and in allowing the State to introduce evidence of a petition for an order of protection that Angela had filed against David, because the petition contained hearsay and denied David his right to confront and cross-examine all witnesses against him, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, § 18(a) of the Missouri Constitution, in that David did not have a prior opportunity to cross-examine Angela about the petition, the hearsay statements contained within the petition were testimonial because they were given while there was no emergency in progress and were made for the purpose of establishing or proving past events potentially relevant to later criminal prosecution, and they were not admissible under the forfeiture by wrongdoing doctrine because the State did not show that David killed Angela to keep her from testifying.

State v. Bell, 950 S.W.2d 482 (Mo.banc 1997);

Crawford v. Commonwealth, 281 Va. 84, 704 S.E.2d 107 (2011);

Giles v. California, 554 U.S. 353 (2008);

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009);

U.S. Const., Amends. VI and XIV;

Mo. Constitution, Article I, §18(a);

Rule 29.11; and

Black's Law Dictionary 62 (8th ed. 2004).

VI.

The trial court abused its discretion in overruling David's objections and in allowing the State to introduce hearsay evidence of Angela's statements to Prenger about David and an alleged trespass by David into her apartment, and a letter she had written to Prenger detailing her fear of David, because this denied David due process and a fair trial as guaranteed by the 6th, and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the hearsay statements were not admissible under the forfeiture by wrongdoing doctrine because the State did not show that David killed Angela to keep her from testifying, and the State never claimed, and the trial court never found, that they qualified under any other hearsay exception.

State v. Bell, 950 S.W.2d 482 (Mo.banc 1997);

State v. Justus, 205 S.W.3d 872 (Mo.banc 2006);

State v. Rios, 234 S.W.3d 412 (Mo.App.W.D. 2007);

Giles v. California, 554 U.S. 353 (2008)

U.S. Const., Amends. VI and XIV;

Mo. Constitution, Article I, §§ 10 and 18(a); and

Rule 29.11.

VII.

The trial court erred in overruling David's motion for judgment of acquittal at the close of all the evidence as to Count III (burglary in the first degree, § 569.160), and in sentencing him for that offense, because the State did not prove his guilt beyond a reasonable doubt, thereby depriving him of his right to due process, as guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was no evidence that David unlawfully entered the apartment building.

State v. Cooper, 215 S.W.3d 123 (Mo.banc 2007);

State v. Grim, 854 S.W.2d 403 (Mo.banc 1993);

State v. Whalen, 49 S.W.3d 181 (Mo.banc 2001);

In re Winship, 397 U.S. 358 (1970);

U.S. Const., Amend. XIV;

Mo. Constitution, Article I, §10;

§§ 569.010 and 569.160; and

Rule 29.11.

VIII.

The trial court abused its discretion in overruling David's objections to the note found in his car (State's Exhibit Nos. 104 and 223), and to testimony relating to that note, because the note was hearsay, not relevant, and the State failed to properly authenticate the note as having been written by David, violating David's right to due process and a fair trial as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the State failed to properly authenticate the note – there was no evidence that it was written by David, there was no timeframe when it was written, there was no signature on it, and it was not a self-authenticating document. Because the note was not shown to be written by David and it did not mention the victim, it was hearsay and irrelevant to the charged crime.

State v. Cravens, 132 S.W.3d 919, 930 (Mo.App.S.D.2004);

State v. Swigert, 852 S.W.2d 158 (Mo. App. W.D. 1993);

State v. Kriedler, 122 S.W.3d 646 (Mo. App. S.D. 2003);

State v. Sutherland, 939 S.W.2d 373 (Mo. banc 1997);

U.S. Const., Amend. XIV; and

Mo. Constitution, Article I, §§ 10 and 18(a).

ARGUMENT

I.

The trial court erred in overruling David's Motion to Suppress Physical Evidence and in admitting into evidence items seized from his car, and all testimony concerning that evidence, because this violated David's right to be free from unreasonable searches and seizures as guaranteed by the 4th Amendment to the U.S. Constitution and Article I, § 15 of the Missouri Constitution, in that the Missouri ping order that was obtained to locate David, which resulted in officers finding, stopping, and arresting David in Oklahoma, was not based upon probable cause because the affidavit supporting the application for that order merely asserted that David had "been identified as the primary suspect in the homicide investigation" without any factual support for that conclusory assertion; and all evidence seized as a result of the ping order and David's subsequent detention were fruits of this poisonous tree. Further, the good faith exception is inapplicable because the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

Introduction

Missouri law enforcement officers obtained a "ping order" for 60 days to locate David through his cell phone based upon the generalized assertion in the affidavit supporting the application for the ping order that David had "been

identified as the primary suspect in the homicide investigation" (Motion Exhibit No. 1). No facts were included in the affidavit or application as to why David was the "primary suspect." This bare assertion did not establish the required probable cause for the ping order. As a result of this unlawfully obtained order, officers tracked David into Oklahoma, arrested him after a traffic stop, and seized a number of weapons and ammunition, including the alleged murder weapon. The motion to suppress should have been granted. David was prejudiced and is entitled to a new trial without the illegally obtained evidence.

Preservation of the issue

David filed a pretrial motion to suppress physical evidence, including any evidence seized from his car (LF138-41). The motion asserted that the initial attempted stop of his car in Oklahoma was without probable cause or reasonable suspicion because Oklahoma officers witnessed no law violation but were merely responding to the request of Missouri officers, who did not have probable cause to request a stop of David's vehicle (LF140-41). The stop and seizure of David, his car, and the items contained within it violated David's constitutional rights under the Fourth Amendment to the United States Constitution and Article I, § 15 of the Missouri Constitution (LF138-41).

The motion also alleged that the search of David's car was unconstitutional in that it was the fruit of the illegal attempted stop of David, the warrant issued to search the car was general in nature, the affidavit failed to establish probable

cause, and the affidavit cited information gathered as a result of the illegal attempt to stop and the unconstitutional search (LF141).

At a hearing on that motion to suppress, the following evidence was presented.

During the early morning hours of September 28, 2009, Angela and Rodney Gilpin were discovered shot to death at their apartment building in Jefferson City, Missouri (Tr.63). Later that morning, Detective Jason Miles of the Jefferson City Police Department interviewed neighbors Jodene Scott and Geralyn Bleckler (Tr.95-96). Scott gave Det. Miles a note that David had left on her car windshield (Tr.95).[13] Bleckler told Det. Miles about a "threatening-type message towards Angela Gilpin" that David had left on Bleckler's phone over the weekend (Tr.96).

Jefferson City Lieutenant David Williams testified that it was determined that morning that David was a person law enforcement officers needed to locate because David "was familiar with the two victims and had also been a resident in that area" and there "was a note involved" (Tr.75-76). There was also information about "prior threats that he had made towards the victims" (Tr.76).

David's car was gone from the area, so Jefferson City officers "shared with all the agencies that the broadcast went out to that [they] wanted to speak to him

[13] The note contained some keys and instructions about taking care of his belongings if anything happened to him (Tr.821, 1049-50).

and the possibility existed that he was involved and that the weapon had not been discovered; so, of course, he should be considered armed and very dangerous based on the information [they] had at that time" (Tr.76, 91).

Jefferson City Detective Barret Wolters prepared an affidavit for a cell phone "ping" order on David's cell phone (Tr.63-64; Motion Exhibit No. 1). The affidavit supporting the ping order application and alleged that David "has been identified as the primary suspect in the homicide investigation," that he utilized the cell phone number set out in the application, that the establishment of a trap and trace precision locator was "essential to the ongoing investigation as it is crucial that David Hosier is apprehended as expeditiously as possibly (sic) to obtain key evidence relevant to the ongoing criminal investigation" (Motion Exhibit No. 1).

The application signed by the Cole County prosecutor similarly alleged that the Jefferson City Police Department was "conducting a homicide investigation in which David R. Hosier has been identified as the primary suspect" in the homicide investigation. ***Id***. The prosecutor also certified that "the information likely to be obtained from the pen register and trap and trace device is relevant to the homicide investigation as it is crucial that David Hosier is apprehended as expeditiously as possibly (sic) to obtain key evidence relevant to the ongoing criminal investigation." ***Id***.

The issuing judge signed an order allowing, in part:

(1) The Jefferson City Police Department to install, or cause to be installed, and use a pen register to register numbers dialed or otherwise transmitted from David's cell phone to record the date and time of such dialings or transmissions, and to record the length of time the telephone receiver is "off the hook" for incoming or outgoing calls for a period of sixty days;

(2) The Jefferson City Police Department to install, or cause to be installed, and use a trap and trace device, on David's cell phone to capture and record the incoming electronic or other impulses which identify the originating numbers of wire or electronic communications, and to record the date, time and duration of calls created by such incoming impulses, for a period of sixty days without geographical limits;

(3) AT&T Wireless to supply subscriber names and addresses, call detail reports starting from September 28, 2009 and periods of telephone activation for numbers dialed or otherwise transmitted to and from David's cell phone, along with 24-hour expedited service on all telephone numbers upon oral or written request by the Jefferson City Police Department;

(4) AT&T Wireless to provide, "on an ongoing and/or real-time basis, the location of cell site/sector (physical address) at call origination (for outbound calling), call termination (for incoming calls) and during the

progress of a call, and direction and strength of signal," for David's cell phone.

(Motion Exhibit No. 1).

Initially, Jefferson City officers believed that David was headed toward Indiana because of his history there (Tr.76-77). They alerted agencies between Jefferson City and the region in Indiana where they thought he was going (Tr.77). They notified all law enforcement agencies "between here and there through the system fusion center and through the inlet's message system" (Tr.77).

After obtaining the "ping order," however, officers were able to track David's cell phone to Oklahoma (Tr.78-80). Lt. Williams made contact with the Oklahoma Highway Patrol (Tr.80). He gave them the "background" as to why David was "wanted" in Missouri for the two homicides (Tr.80-81). David was "at the top of the list of people" whom Jefferson City officers wanted to immediately locate (Tr.92). When Lt. Williams testified about what information was used to justify having David's vehicle pulled over, he said:

> [David] was a person familiar with both victims and that there had been an occurrence that we wanted to speak with him and we wanted to speak with him as soon as possible. So that was the basis for us asking them to stop the car. And, again, as I said, it was officer safety information. We were looking for a firearm, and we didn't have it, so that included the concern factor.

(Tr.90).

Later, an Oklahoma trooper spotted a car matching the description of David's car (Tr.83). That trooper attempted to stop David, but David did not initially stop (Tr.83). The State stipulated that David was driving lawfully in Oklahoma when the trooper activated his lights and David did not flee until after the lights were activated (Tr.102-03). After a pursuit, David's car was stopped and he was taken into custody (Tr.84).

After David was arrested in Oklahoma, Missouri officers flew to Oklahoma and assisted in obtaining an Oklahoma search warrant for David's clothing and car (Tr.100-01; Motion Exhibit Nos. 4, 5). A search of the car's front passenger compartment revealed a weapon that could have been used to commit the murders (Tr.1066-68, 1070-71, 1076, 1078, 1086-87, 1096, 1108, 1114-15, 1184, 1185-87, 1191, 1202-1219, 1293-94).

After the motion to suppress hearing, David argued that the officers did not show that they had probable cause to get the ping order (Tr.105). The "probable cause information" was "deficient in the warrant request for the ping" (Tr. 105-106). David also argued that the car stop was made purely upon the request of Jefferson City officers since Oklahoma officers had not observed anything illegal prior to activating their lights and attempting to stop David (Tr.105). Although his subsequent flight could be viewed as criminal activity, it was the fruit of the attempted stop prior to any observable criminal behavior (Tr.106). The initial information acted upon by the officers was not sufficient to justify seeking David's personal information from the phone company, or to have him pulled over

in Oklahoma (Tr.106). The court should suppress all of the evidence that was the fruit of that unlawful stop (Tr.106).

The only argument made by the prosecutor during the motion to suppress was that the items "were lawfully seized evidence" (Tr. 104).

The trial court overruled the motion to suppress without giving a basis for the ruling (LF12).

In David's motion for new trial, he alleged, in part, that the trial court erred when it overruled David's continuing objection and allowed introduction of testimony, photographs, and physical evidence of items unlawfully seized from David and his car (LF432-433; claims 20 and 21). This point is properly preserved for appeal. ***Rule 29.11(d)***.

Standard of Review

At a hearing on a motion to suppress, the State bears the burden of proving by a preponderance of the evidence that the motion should be overruled. ***State v. Grayson***, 336 S.W.3d 138, 142 (Mo.banc 2011). In reviewing a trial court's decision to overrule a motion to suppress and allow admission of the evidence and testimony in question, this Court reviews the evidence presented both at the suppression hearing and at trial. ***Id***. All facts and reasonable inferences from the facts should be stated favorably to the trial court's order, and this Court reviews to determine if the evidence is sufficient to support the ruling or if it is clearly erroneous. ***Id***. However, the legal determination of whether reasonable suspicion

or probable cause existed is reviewed *de novo*. ***Id***.; ***Ornelas v. U.S.***, 517 U.S. 690, 699 (1996).

This Court gives great deference to the initial judicial determination of probable cause made at the time of the issuance of a search warrant and reverses only if that determination is clearly erroneous. ***State v. Berry***, 801 S.W.2d 64, 66 (Mo.banc 1990). In reviewing whether the issuing judge was clearly erroneous, this Court looks to the four corners of the affidavit in support of the warrant. ***State v. Laws***, 801 S.W.2d 68, 70 (Mo.banc 1990).

Technical background

Here, the issuing judge ordered AT&T Wireless to provide, "on an ongoing and/or real-time basis, the location of cell site/sector (physical address) at call origination (for outbound calling), call termination (for incoming calls) and during the progress of a call, and direction and strength of signal," for David's cell phone (Motion Exhibit No. 1). After obtaining this "ping order," officers were able to track David to his location in Oklahoma where he was stopped, arrested, and evidence was seized, including the alleged murder weapon (Tr.78-80, 84, 1066-71, 1076, 1078, 1086-87, 1096, 1108, 1114-15, 1184-87, 1191, 1202-1219, 1293-94).

"Prospective" or "real-time" cell site data refers to the acquisition of data for a period of time going forward from the date of the order. ***United States v. Espudo***, 954 F.Supp.2d 1029, 1034 (S.D. Cal. 2013). Cellular telephones can be located in one of two ways: by cell-site tracking or by GPS signal locating. ***United***

States v. Powell, 943 F.Supp.2d 759, 767 (E.D. Mich. 2013). Cell-site tracking exploits a cell phone's need to connect to a cellular network. ***Id***. A cell phone must be in contact with a cell tower to transmit calls, text messages, *etc*. ***Id***. Once a cell phone is activated, it will automatically search for the closest cell tower. ***Id***. Once the phone locates a tower, it submits a unique identifier (its "registration" information) to the tower so that any outgoing and incoming calls can be routed through the correct tower. ***Id***. This occurs every several seconds. ***Id***. If a signal to or from a tower changes strength, or the cell phone moves, the cell phone may switch its registry to a different tower. ***Id***. This makes it possible to calculate a cell phone's location within anywhere from several blocks to a few feet using the mathematical process of "multilateration." ***Id***.

"Law enforcement officers can artificially speed up the location process by 'pinging' a cell phone, that is, sending an electronic signal to a target cell phone – such as by dialing a number and hanging up – that triggers an identification transmission from the phone. Thus, law enforcement can obtain location data from a cell phone at will." ***Id***. "Pinging" is undetectable to the cellular telephone user. ***In Re Application of U.S. for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone***, 849 F.Supp.2d 526, 534 (D. Md. 2011) (***In re Application***).

Some phones are now equipped with GPS locators that can identify a phone's location by using a built-in GPS device. ***Powell***, 943 F.Supp.2d at 767. "In both the 'cell-site location' or 'GPS location' situations, the government can

either track a person in real-time using live registration or GPS data, known as 'prospective' records; or compile a list of a person's recent movements with his or her cell phone, known as 'historic' records." But if a cell phone is not turned on, it cannot transmit any data. ***Id***.

Constitutional provisions involved

Both the United States and Missouri Constitutions protect citizens from unreasonable searches and seizures.

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." ***U.S. Const., Amend. IV***.[14]

Likewise, the Missouri Constitution ensures "[t]hat the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation." ***Mo. Const., Art. I, Sec. 15***.

[14] The Fourteenth Amendment extends this protection to prosecutions by the states. ***Mapp v. Ohio***, 367 U.S. 643 (1961).

The Fourth Amendment is concerned both when the government violates a subjective expectation of privacy that society recognizes as reasonable and also when the government commits a trespassory intrusion on property. ***United States v. Jones***, 132 S.Ct. 945, 954-55 (2012) (Sotomayor, J. concurring).

Thus, a violation of the Fourth Amendment occurs when government officers violate a person's reasonable expectation of privacy. ***Jones***, 132 S.Ct. at 950, *citing* ***Katz v. United States***, 389 U.S. 347, 360 (1967). The government's request for real-time location data implicates at least two distinct privacy interests: the subject's right to privacy in his location as revealed by real-time location data *and* his right to privacy in his movement. ***In Re Application***, 849 F.Supp.2d at 538-39. This is because pinging a particular cell phone will in many instances place the user within a home, or even a particular room of a home, and thus the requested location data falls within the protection of ***Kyllo v. United States***, 533 U.S. 27 (2001) (thermal imaging device used to measure heat emanating from a home violated Fourth Amendment). ***In Re Application***, 849 F.Supp.2d 540. at 538-39.

In ***Jones***, *supra*, five justices of the United States Supreme Court concluded that an investigative subject's "reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." ***Jones***, 132 S.Ct. at 958, 964 (Alito, J. concurring); ***id***. at 955 (Sotomayor, J. concurring). If tracking a vehicle for 28 days is a search, then surely an order allowing the tracking of a cell phone for 60 days is likewise a search, particularly since people

keep their cell phones with them in their purses and pockets as they traverse both public and private spaces. "A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups -- and not just one such fact about a person, but all such facts." ***United States v. Maynard***, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd sub nom*. ***United States v. Jones***, 132 S.Ct. 945 (2012). Just as "society's expectation has been that law enforcement agents and others would not … secretly monitor and catalogue every single movement of an individual's car for a very long period," ***Jones***, 132 S.Ct. at 964 (Alito, J., concurring), so, too, it is society's expectation that the government would not track the location of a cell phone for 60 days. The expectation that a cell phone will not be tracked is even more acute than the expectation that cars will not be tracked because people are only in their cars for discrete periods of time, but they carry their cell phones with them practically everywhere. Modern cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." ***Riley v. California***, --- S.Ct. ---, 2014 WL 2864483, * 9 (June 25, 2014).

But there is also a common-law trespassory test that preceded ***Katz's*** reasonable-expectation-of-privacy test. ***Jones***, 132 S.Ct. at 949-50. Cell phone pinging involves trespassory intrusions on property, thus implicating the Fourth Amendment. Pinging is an active, outside interference with and control over a

phone's function without the owner's consent. ***In re Application***, 849 F.Supp.2d at 531, 538-39. At the request of the government, cell service providers send a signal -- or ping – to the cell phone, ordering it to transmit its location without alerting its user. ***Id***. Arguably, this is a trespass to chattels since by pinging the cell phone, authorities send unwanted signals that force a person's phone to do something that its owner does not know about or want; this interference can lead to impairment of the phone's value by using more battery power. Justice Alito's concurring opinion in ***Jones*** questioned, "Would the sending of a radio signal to activate [a GPS] system constitute a trespass to chattels?" ***Jones***, 132 S.Ct. at 962 (Alito, J., concurring). He also noted that while, traditionally, trespass to chattels has required a physical touching of the property, recently courts have applied this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. ***Id***.[15]

[15] Justice Scalia's majority opinion, however, summarily stated that "[s]ituations involving *merely* the transmission of electronic signals without trespass would remain subject to *Katz* analysis." ***Jones***, 132 S.Ct. at 953 (emphasis added and deleted). But Justice Scalia conceded that it "may be that achieving the same result [long-term surveillance] through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present cases does not require us to answer that question." ***Id***. at 953-54.

State must make a probable-cause showing to get real-time cell site location data

"Privacy comes at a cost." ***Riley***, 2014 WL 2864483 at * 19. "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." ***Id***. at *13.

Using a combination of statutory and Fourth Amendment analysis, the majority of federal courts examining the requirements for the acquisition of real-time cell site location data require that the government make a probable-cause showing. ***Espudo***, 954 F.Supp.2d at 1035, 1038 (listing cases); ***Powell***, 943 F.Supp.2d at 770-71.

Some jurisdictions interpret their state constitutions to require a warrant supported by probable cause to obtain tracking information through the use of a cell phone unless some other exception to the warrant requirement applies. ***State v. Earls***, 214 N.J. 564, 584-89, 70 A.3d 630, 642-44 (2013) (reasoning that using a cell phone to determine the owner's location is akin to using a tracking device and involves a degree of intrusion that a reasonable person would not anticipate), *citing* ***Jones***, 132 S.Ct. at 955-56 (Sotomayor, J. concurring), 964 (Alito, J. concurring); ***Commonwealth v. Rushing***, 2013 PA Super 162, 71 A.3d 939 (2013).

A minority of jurisdictions do not accord any protection to cell-site information, reasoning that there is no legitimate expectation of privacy for such information, or they authorize the use of such information on a showing of less than probable cause. ***Powell***, 943 F.Supp.2d at 770-73.

The ping order was not supported by probable cause

A neutral magistrate issuing a search warrant or ping order must determine probable cause from the totality of the circumstances. ***Illinois v. Gates***, 462 U.S. 213, 238 (1983). That decision is to be made based upon all the circumstances set out in the affidavit including the "basis of knowledge" and "veracity" of persons providing the hearsay information. ***Id***. Probable cause is "a fair probability that contraband or evidence of a crime will be found." ***Id***. The issuing judge must be supplied with sufficient information to support an independent judgment that probable cause exists; the affiant must present more than the affiant's conclusion that the individual named perpetrated the offense described in the affidavit. ***Whiteley v. Warden, Wyo. State Penitentiary***, 401 U.S. 560, 564-65 (1971).

While this Court must give the issuing judge's initial determination "great deference," the judge does not have unbridled discretion. ***State v. Hammett***, 784 S.W.2d 293, 295 (Mo.App. E.D. 1989). An affidavit must provide the issuing judge with a *substantial* basis for determining the existence of probable cause. ***Id.*** at 293, *quoting* ***Gates***, 462 U.S. at 239. That substantial basis must exist *before* the search warrant is issued, not afterwards with the benefit of 20-20 hindsight. ***Hammett***, 784 S.W.2d at 293. And, it must be contained within the four corners of the application and/or supporting affidavits since the issuing judge may not consider oral testimony in determining whether there is probable cause. ***State v. Gordon***, 851 S.W.2d 607, 612 (Mo.App. S.D. 1993).

As noted above, the affidavit supporting the ping order alleged that David "has been identified as the primary suspect in the homicide investigation," and that the establishment of a trap and trace precision locator was "essential to the ongoing investigation as it is crucial that David Hosier is apprehended as expeditiously as possibly (sic) to obtain key evidence relevant to the ongoing criminal investigation" (Motion Exhibit No. 1). The application signed by the Cole County prosecutor similarly alleged that the Jefferson City Police Department was "conducting a homicide investigation in which David R. Hosier has been identified as the primary suspect." (Motion Exhibit No. 1). Neither the affidavit nor the application set forth facts or circumstances from which a judge could find probable cause. Nothing supported the conclusory statement that David was "the primary suspect." The affidavit and application were nothing more than an impermissible "conclusion that the individual named perpetrated the offense described in the affidavit." ***Whiteley***, 401 U.S. at 564-65.

The evidence must be excluded as fruits of the poisonous tree

Under the exclusionary rule, when the government exploits illegally obtained evidence, subsequent searches and seizures based on that evidence are tainted and subject to the exclusionary rule as fruits of the poisonous tree. ***United States v. Calandra***, 414 U.S. 338, 348 (1974); ***Wong Sun v. United States***, 371 U.S. 471, 484-85 (1963). The exclusionary prohibition extends to indirect as well as direct products of the illegal search or seizure. ***Wong Sun***, 371 U.S. at 485,

citing ***Silverthorne Lumber Co. v. United States***, 251 U.S. 385 (1920). The question is "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ***Wong Sun***, 371 U.S. at 488 (citation omitted).

Here, the items found and seized in David's car after he was stopped in Oklahoma came about by the exploitation of the primary illegality (a ping order that was not based on probable cause). Law enforcement officials used the illegally obtained ping order to locate David in Oklahoma and stop him. That stop led to officers finding and seizing a weapon that at trial the State alleged was the murder weapon. That weapon was the product of the fruit of the poisonous tree (the ping order) and should have been excluded from evidence, as well as the other items found in the car, including fourteen other firearms (See Point IV).

The good faith exception does not apply

In ***United States v. Leon***, 468 U.S. 897 (1984), the United States Supreme Court created a good faith exception to the application of the exclusionary rule. Under this exception to the exclusionary rule, the government is not barred from introducing evidence obtained by officers acting in objectively reasonable reliance on a search warrant that is subsequently invalidated. ***Id***. at 918-21. This Court must ask "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." ***Id***. at 922 n. 23.

There are at least four situations in which reliance on a warrant cannot be considered objectively reasonable, and therefore the good faith exception cannot apply: (1) if the issuing judge was misled by information that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) if the judge wholly abandons the judicial role; (3) if the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) if the warrant is so facially deficient that the executing officers cannot presume it to be valid. ***Id.*** at 923.

Here, the third situation recognized in ***Leon*** is involved. The affidavit relied on by the issuing judge was so lacking in indicia of probable cause as to render official belief in probable cause unreasonable. ***United States v. Herron***, 215 F.3d 812, 814 (8th Cir. 2000). Although quality of information, not quantity, is what establishes probable cause," ***Hammett***, 784 S.W.2d at 297, here, the quality, as well as the quantity, of the information was insufficient to establish any indicia of probable cause. An affidavit alleging that David "has been identified as the primary suspect in the homicide investigation," is an impermissible "bare bones" affidavit that is incapable of supporting a finding of probable cause. ***Id***. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." ***Gates***, 462 U.S. at 239. Thus, the good-faith exception to the exclusionary rule is not available here. ***Hammett***, 784 S.W.2d at 297; ***State v. Brown***, 741 S.W.2d 53, 58-60 (Mo.App.W.D. 1987)

The trial court erred when it overruled the Motion to Suppress Physical Evidence and when it allowed the State to introduce evidence from David's car. David was prejudiced because the illegal search allowed officers to discover the submachine gun that an expert witness testified was the murder weapon – the sole physical item that was used to place David at the scene. David's convictions should be reversed and his case remanded for a new trial without the illegally-seized evidence. ***State v. Barks***, 128 S.W.3d 513, 518 (Mo.banc 2004).

II.

The trial court erred in overruling David's Motion to Suppress Physical Evidence and in admitting into evidence items seized from his car, and all testimony concerning that evidence, because this violated David's right to be free from unreasonable searches and seizures as guaranteed by the 4th Amendment to the U.S. Constitution and Article I, § 15 of the Missouri Constitution, in that the Oklahoma officer who activated his emergency lights and ultimately stopped David's car had not observed any traffic violation prior to activating his emergency lights, rather he was only stopping David at the request of Missouri officers who did not have probable cause to request Oklahoma officers to take David into custody so that Missouri officers could question him; all evidence seized from David and his car following this unlawful detention and seizure was fruit of the poisonous tree; David was prejudiced because one of the items seized was a submachine gun that was later identified by a highway patrol criminalist as being the gun that extracted or ejected the shell casings found at the murder scene, which was the only evidence placing David at the scene of the murders.

Issue Presented

Missouri law enforcement officers requested that Oklahoma law enforcement officers stop David's car because "he was a person familiar with both victims and there had been an occurrence that we wanted to speak with him and

we wanted to speak with him as soon as possible. So that was the basis for us asking them to stop the car" (Tr.90).

The Oklahoma officer who activated his emergency lights to stop David's car did not observe any traffic violation prior to activating his lights; rather, he did so solely at the request of the Missouri officers. After a car chase, David finally stopped his car. A search of that car turned up the alleged murder weapon.

The issue on this appeal is whether a "seizure" occurs when a police officer activates the emergency lights on the patrol car, or whether it occurs only after the person stops after committing some traffic violations in flight from the officer.

If David was "seized" at the time the officer activated his lights and the officer did not have probable cause to stop David at that time, then the trial court should have suppressed the evidence. Since there were no eye witnesses, David never admitted to committing the murders, and no DNA evidence linked David to the scene, suppression would have rendered the State unable to prove that David possessed the alleged murder weapon – the one piece of evidence tying David to the murder scene. A new trial should be ordered.

Standard of Review and Preservation

At a hearing on a motion to suppress, the State bears the burden of proving by a preponderance of the evidence that the motion should be overruled. ***State v. Grayson***, 336 S.W.3d 138, 142 (Mo.banc 2011). In reviewing a trial court's decision to overrule a motion to suppress and allow admission of the evidence and

testimony in question, this Court reviews the evidence presented both at the suppression hearing and at trial. ***Id***. All facts and reasonable inferences from the facts should be stated favorably to the trial court's order, and this Court reviews to determine if the evidence is sufficient to support the ruling or if it is clearly erroneous. ***Id***. However, the legal determination of whether reasonable suspicion or probable cause existed is reviewed *de novo*. ***Id***.; ***Ornelas v. U.S.***, 517 U.S. 690, 699 (1996).

David filed a pretrial motion to suppress physical evidence, including any evidence seized from his car (LF138-41). The motion asserted that the initial attempted stop of his car in Oklahoma was without probable cause or reasonable suspicion because Oklahoma officers witnessed no law violation but were merely responding to the request of Missouri officers, who did not have probable cause to request a stop of David's vehicle (LF140-41). The stop and seizure of David, his car, and the items contained within it violated David's constitutional rights under the Fourth Amendment to the United States Constitution and Article I, § 15 of the Missouri Constitution (LF138-41).

At a hearing on the motion to suppress, the following evidence was presented.

During the early morning hours of September 28, 2009, Angela and Rodney Gilpin were discovered shot to death at their apartment building in Jefferson City, Missouri (Tr.63). Later that morning, Jefferson City Detective Jason Miles interviewed neighbors Jodene Scott and Geralyn Bleckler (Tr.95-96).

Scott gave Det. Miles a note that David had left on her car windshield (Tr.95).[16] Bleckler told Det. Miles about a "threatening-type message towards Angela Gilpin" that David had left on Bleckler's phone over the weekend (Tr.96).[17]

Another Jefferson City detective prepared search warrant applications for the Gilpins' and David's apartments, and a cell phone "ping" order on David's cell phone (Tr.63-64; Motion Exhibit Nos. 1, 2, and 3).[18]

Jefferson City Lieutenant David Williams testified that it was determined that morning that David was a person they needed to locate because David "was familiar with the two victims and had also been a resident in that area" and there "was a note involved" (Tr.75-76). There was also information about "prior threats

---

[16] The note contained some keys and instructions about taking care of his belongings if anything happened to him (Tr.821, 1049-50).

[17] At trial it was shown that the message said, in pertinent part: "I told you to tell her to get her fuckin ass out of my sight for good. Get the fuck away from here. Move back with fuckin Rodney. Get out of that god damn apartment. You didn't tell her that. I'm gonna fuckin finish it. I'm tired of the shit. You don't believe me. I'm tired of the shit" (State's Exhibit No. 12).

[18] Point I challenges the ping order and discusses the allegations asserted in the affidavit to secure that order. Point III challenges the search of David's apartment and sets forth the allegations asserted in the affidavit to obtain that warrant.

that he had made towards the victims" (Tr.76).[19] David's car was gone from the area, so Jefferson City officers "shared with all the agencies that the broadcast went out to that [they] wanted to speak to him and the possibility existed that he was involved and that the weapon had not been discovered; so, of course, he should be considered armed and very dangerous based on the information [they] had at that time" (Tr.76, 91).

After obtaining a "ping order," officers were able to track David's cell phone to Oklahoma (Tr.78-80). Lt. Williams made contact with an Oklahoma Highway Patrol trooper (Tr.80). He gave the trooper the "background" as to why David was "wanted" in Missouri for the two homicides (Tr.80-81). David was "at the top of the list of people" that Jefferson City officers wanted to immediately locate and find (Tr.92). When Lt. Williams testified about what information was used to justify having David's vehicle pulled over, he said:

> [David] was a person familiar with both victims and that there had been an occurrence that we wanted to speak with him and we wanted to speak with him as soon as possible. So that was the basis for us asking them to stop the car. And, again, as I said, it was officer safety information. We were

[19] Presumably, the alleged threats concern the phone message David left with Bleckler since it was mentioned in the application to search David's apartment. See Point III.

looking for a firearm, and we didn't have it, so that included the concern factor.

(Tr.90).

Later, an Oklahoma trooper contacted Lt. Williams and told him that another Oklahoma trooper had spotted a car matching the description of David's car and was trying to stop it, but the car would not stop (Tr.83). The State stipulated that David had been driving lawfully in Oklahoma when an Oklahoma trooper activated his lights and David only attempted to flee after the lights were activated (Tr.102-03). After a pursuit, David was stopped, and he was taken into custody (Tr.84).

After the motion to suppress hearing, David argued that the car stop in Oklahoma was made purely upon the request of Jefferson City officers since the Oklahoma trooper had not observed anything illegal before activating his lights and attempting to stop David's car (Tr.105). Although David's subsequent flight could be viewed as criminal activity, it was the fruit of the unlawful attempt to stop the car prior to any observable criminal behavior (Tr.106). The initial information acted upon by the officers was not sufficient to justify having David pulled over (Tr.106). The court should suppress all evidence that was the fruit of that unlawful stop (Tr.106). The State did not specify why the motion to suppress should be denied, rather only argued, "the items seized pursuant to …stop the defendant were lawfully seized evidence and can be used at trial and should not therefore be suppressed" (Tr.104).

The trial court overruled the motion to suppress without giving any reasoning for its decision (LF12).

The evidence presented at trial further described the traffic stop.

Around 9:45 a.m., the Oklahoma Highway Patrol received information from the Jefferson City Police Department about a "wanted car and person" (Tr.899, 927). A "ping" from David's cell phone revealed that he was in the Kansas/Oklahoma area (Tr.899).

Later that morning, Oklahoma officers began pursuing David near Tahlequah, Oklahoma (Tr.899-901). It was a "moderate-speed" pursuit, which was around the speed limit (Tr.920, 932-33). During the pursuit, one law enforcement vehicle partially blocked the road, but David drove around it and continued southbound (Tr.921-22). Finally, shortly before 11:00 a.m., David stopped his car (Tr.923, 927). Among the items in the car were 15 firearms, including a STEN submachine gun, and a lot of ammunition (Tr.1055-56, 1066-71, 1076-78, 1083-89, 1091-96, 1108, 1114-1115).[20]

A Missouri State Highway Patrol criminalist testified that he examined the shell casings and bullets seized from the crime scene and autopsy and compared them to the 9-millimeter STEN submachine gun seized from David's car (Tr.1184,

[20] David renewed his objection to items seized from the car based on the motions to suppress and was allowed a continuing objection (Tr.1055-56, 1090, 1093, 1096, 1115).

1185-87, 1191, 1202-1219, 1293-94). The criminalist concluded that some of the cartridge casings could have been fired from the STEN, but he was not certain (Tr.1184, 1185-87, 1191, 1202-1219, 1293-94). Based upon extractor and ejector marks found on some of the casings, however, he believed that some of the cartridge cases had been extracted and some had been ejected from that firearm (Tr.1184, 1185-87, 1191, 1202-1219, 1293-94). But the criminalist could not say definitively that they had been fired from it (Tr.1184, 1185-87, 1191, 1202-1219, 1293-94). And, although some of the unknown expended bullets could have been fired from that submachine gun, it did not rise to a level of identification (Tr. 1184, 1185-87, 1191, 1202-1219, 1293-94).

In David's motion for new trial, he alleged, in part, that the trial court erred when it overruled David's continuing objection and allowed introduction of testimony, photographs, and physical evidence of items unlawfully seized from David and his car (LF 432-433; claims 20 and 21).

Constitutional provisions

Both the United States and Missouri Constitutions protect citizens from unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures

shall not be violated …." ***U.S. Const., Amend. IV***.[21] "[T]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures …." ***Mo. Const., Art. I, Sec. 15***.

Generally, subject only to a few specifically-established and well-delineated exceptions, warrantless searches and seizures are deemed *per se* unreasonable. ***State v. Tackett***, 12 S.W.3d 332, 337 (Mo.App.W.D. 2000). The State has the burden to justify a warrantless search and seizure by demonstrating that it falls within an exception. ***Id***. A person may not be detained even momentarily without reasonable, objective grounds for doing so. ***Florida v. Royer***, 460 U.S. 491, 498 (1983). The purpose of the prohibition against unreasonable searches and seizures is to "safeguard the privacy and security of individuals against arbitrary invasions of government officials." ***Camara v. Municipal Court***, 387 U.S. 523, 528 (1967).

Both the United States and Missouri Constitutions prohibit "unreasonable … seizures." David was unquestionably "seized" in Oklahoma. To resolve this point on appeal, however, this Court must first determine whether David was seized at the time the officer activated his emergency lights or after the car chase. If the seizure occurred when the officer activated his emergency lights, then this Court must determine whether that seizure was "unreasonable." If the

[21] The Fourteenth Amendment extends this protection to prosecutions by the states. ***Mapp v. Ohio***, 367 U.S. 643 (1961).

seizure did not occur until after the car chase, then the officer had probable cause to arrest David for the traffic violations. Thus, a determination of when the seizure occurred is important.

David was "seized" when the officer activated his emergency lights

In ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980), the United States Supreme Court held that a person has been "seized" within the meaning of the Fourth Amendment of the United States Constitution if, in view of all the circumstances surrounding the event, "a reasonable person would have believed that he was not free to leave." This Court has often adopted this same test for determining when a person has been seized. *See*, ***State v. Werner***, 9 S.W.3d 590, 600 (Mo.banc 2000); ***State v. Sund***, 215 S.W.3d 719, 723 (Mo.banc 2007); ***Grayson***, 336 S.W.3d at 143; ***State v. Norfolk***, 366 S.W.3d 528, 533 (Mo.banc 2012).

Using this test, courts have held that when an officer activates the emergency lights of a patrol car, a person has been seized, because under those circumstances a reasonable person would not believe that he was free to leave. E.g., ***State v. Binette***, 33 S.W.3d 215 (Tenn. 2000); ***State v. Pulley***, 863 S.W.2d 29 (Tenn. 1993); ***State v. Bergerson***, 659 N.W.2d 791 (Minn.App. 2003).

But, after ***Mendenhall***, the United States Supreme Court, in ***California v. Hodari D.***, 499 U.S. 621, 626 (1991), held that a person is "seized" for purpose of the Fourth Amendment only where an officer uses physical force to detain a

person or where a person submits or yields to a show of authority by the officer. This Court has also cited this test. *See*, ***State v. Deck***, 994 S.W.2d 527, 535 (Mo.banc 1999) ("A person is not 'seized' until either being subjected to the application of physical force by the police or by voluntarily submitting to the assertion of police authority."). ***In accord***, ***Smither v. Dir. of Revenue***, 136 S.W.3d 797, 799 (Mo.banc 2004). Under this test, a person would not be seized until he or she stopped in response to the emergency lights (i.e., they yielded or submitted to the show of authority).

Despite the ***Deck*** opinion, this Court has usually used the ***Mendenhall*** "reasonable person would not believe that they were free to leave" standard, as noted above (***Werner***, *supra*; ***Sund***, *supra*; ***Grayson***, *supra; **Norfolk**, supra*). Thus, it is unclear what test this Court would apply in a situation like the one presented on appeal.

Under the ***Hodari D.*** test, David did not submit or yield to authority until after the car chase, and thus those traffic violations would have given the officer probable cause to arrest him. But under the ***Mendenhall*** test, David was seized prior to the traffic violations because a reasonable person would not have believed that he was free to leave once the officer activated his emergency lights. Under

Mendenhall, the officer needed reasonable suspicion or probable cause that David had committed an offense before activating his emergency lights.[22]

Numerous state courts have rejected the majority's analysis in ***Hodari D.*** on state constitutional grounds. First ***Hodari D.*** represented a marked departure from the ***Mendenhall*** standards. Second, it failed to apply common law principles under which an arrest was not distinguished from an attempted arrest in determining whether a person has been seized.[23] Third, the majority's analysis in ***Hodari D.*** is subject to potential abuse by officers who pursue a subject without reasonable suspicion and use a flight or refusal to submit to authority as reason to execute an arrest or search. *See* ***State v. Randolph***, 74 S.W.3d 330, 335-36 (Tenn. 2002) (listing cases rejecting ***Hodari D.*** on state constitutional grounds); ***Commonwealth v. Stoute***, 422 Mass. 782, 665 N.E.2d 93 (1996); ***State v. Oquendo***, 223 Conn. 635, 651, 613 A.2d 1300 (1992); ***State v. Quino***, 74 Haw. 161, 170, 840 P.2d 358 (1992), ***Matter of Welfare of E.D.J.***, 502 N.W.2d 779

---

[22] As argued by David later in this argument, the Oklahoma officer needed probable cause rather than reasonable suspicion to take him into custody so that he could be questioned by Missouri authorities.

[23] As Justice Stevens noted in his dissenting opinion in ***Hodari D.***, an unlawful *attempt* to take a presumptively innocent person into custody was unlawful at common law. 499 U.S. at 631-32, *citing* ***Perkins, The Law of Arrest***, 25 Iowa L.Rev. 201, 263 (1940).

(Minn. 1993); ***Commonwealth v. Matos,*** 543 Pa. 449, 672 A.2d 769 (Pa. 1996); ***State v. Tucker***, 136 N.J. 158, 165, 642 A.2d 401 (1994).

This Court should follow suit and interpret the Missouri Constitution as in its prior cases holding that a person has been seized when a reasonable person would not believe that he was free to leave.[24] In ***Randolph***, the Tennessee Supreme Court rejected ***Hodari D***., reasoning that since the time that case was decided, Tennessee court had continued to apply the standard set forth in ***Mendenhall***, i.e., whether in view of all of the circumstances surrounding the incident, a reasonable person would have believed he or she was not free to leave. ***Randolph***, 74 S.W.3d at 336. Similarly, this Court has continued to use the

---

[24] David acknowledges that thus far this Court has held that the Missouri and federal constitutional protections from unreasonable searches and seizures are coextensive and thus the same analysis applies to cases under the Missouri Constitution as under the United States Constitution. ***State v. Pike***, 162 S.W.3d 464, 472 (Mo.banc 2005). This Court has noted that provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions, but the construction given to the Fourth Amendment of the federal constitution by the Supreme Court of the United States is strongly persuasive in construing the like section of our state constitution. ***State v. Rushing***, 935 S.W.2d 30, 34 (Mo.banc 1996).

Mendenhall test. E.g., ***Werner***, *supra*; ***Sund***, *supra*; ***Grayson***, *supra*; ***Norfolk***, *supra*.

In rejecting the ***Hodari D***. standard on state constitutional grounds in favor of existing state precedent, the Supreme Court of Washington stated:

> Washington search and seizure law stemming from ***Terry*** and proceeding through ***Mendenhall*** is well-established. Were we to adopt ***Hodari D.*** and its new definition of seizure … we would be departing from our precedents and the greater protection of privacy afforded Washington citizens under [the state constitution]. Given the erosion of privacy the ***Hodari D.*** decision entails, we adhere to our established jurisprudence and reject application of the test for a seizure articulated in ***Hodari D***. … under [the state constitution].

State v. Young, 135 Wash. 2d 498, 510, 957 P.2d 681, 687 (1998).

This Court should similarly refrain from departing from its precedents and offer Missouri citizens greater protection than that afforded by the ***Hodari D.*** test. The distinction made by the United States Supreme Court between an arrest and an attempted arrest at common law should not guide this Court's determination of what constitutes a seizure under the Missouri constitution, particularly since, as noted above, an attempted arrest was also unlawful at common law. ***Oquendo***, 613 A.2d at 1309-10.

Here, it was stipulated that David's car had been driving lawfully in Oklahoma when an Oklahoma officer activated his lights and David only fled after

the lights were activated (Tr. 102-03). David was seized from the moment that the officer activated his lights because, at that time, a reasonable man would not have believed that he was free to go. ***Grayson***, 336 S.W.3d at 143; ***Bergerson***, 659 N.W.2d at 795-96. If the officer did not lacked probable cause to seize David at that time, then the seizure was unconstitutionally unreasonable, and the fruits of that unconstitutional seizure and subsequent search should have been suppressed. David's subsequent flight is not relevant, because it occurred *after* the emergency lights were activated; probable cause and reasonable suspicion are measured at the time of the seizure. ***Id***. Police conduct that provokes flight precludes consideration of that factor in determining whether reasonable suspicion or probable cause existed. ***Oquendo***, 613 A.2d at 1312.

Officers did not have probable cause to seize David

Generally, a search or seizure is only permissible if probable cause existed to believe a person has committed or is committing a crime. ***Norfolk***, 366 S.W.3d at 533. While in some circumstances a person may be detained briefly without probable cause to arrest, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. ***Reid***, 448 U.S. at 440; ***Royer***, 460 U.S. at 498.

The Oklahoma troopers were *not* attempting to briefly detain David. They were attempting to take him into custody so that Missouri officers could question

him. This was *not* an attempted detention, which only requires reasonable and articulable suspicion; it was an attempted arrest, which requires probable cause. ***State v. Kinkead***, 983 S.W.2d 518, 519 (Mo.banc 1998). While an officer may rely on information from another officer in developing probable cause, the state must show that the officer who disseminated the information had probable cause, which would have allowed that officer to make the arrest. ***Id***. Probable cause is determined by the collective knowledge and facts available to all of the officers participating in the arrest. ***State v. Witte***, 37 S.W.3d 378, 382 (Mo.App.S.D.2001). These facts and knowledge must "warrant a man of reasonable caution in the belief that an offense has been or is being committed." ***State v. Glass***, 136 S.W.3d 496, 510 n. 5 (Mo.banc 2004) (quoting ***Brinegar v. United States***, 338 U.S. 160, 175–76 (1949)).

At the time David was seized, the officers did not have probable cause to believe that David killed the victims. Lt. Williams testified that Jefferson City officers requested Oklahoma officers to stop David because "[David] was a person familiar with both victims and that there had been an occurrence that we wanted to speak with him and we wanted to speak with him as soon as possible. So that was the basis for us asking them to stop the car." (Tr. 90). That testimony does not rise to reasonable suspicion, much less probable cause; it is more like a "hunch," which is not enough to justify a seizure. ***Terry v. Ohio***, 392 U.S. 1, 30 (1968).

The police learned of David's note asking Scott to take care of his belongings (Tr. 95, 821, 1049-50). But that note did not connect David to the

crime. Bleckler told Det. Miles about a "threatening-type message towards Angela Gilpin" that David left on Bleckler's phone over the weekend (Tr. 96). But that message only expressed David's desire for Angela to move out of her apartment, and the comment "I'm gonna fuckin finish it" (State's Exhibit No. 12) was too vague in its meaning to connect David to the homicides and would not warrant a person of reasonable caution to believe that David had committed the murders. ***Glass***, 136 S.W.3d at 510 n. 5.

Conclusion

David was prejudiced by the illegal seizure. After the Oklahoma officer seized and arrested David, officers found 15 firearms in his car, including a STEN submachine gun, and a lot of ammunition (Tr. 1055-56, 1066-71, 1076-78, 1083-89, 1091-96, 1108, 1114-1115). A Missouri State Highway Patrol criminalist examined the shell casings and bullets seized from the crime scene and autopsy and compared them to the STEN (Tr. 1184, 1185-87, 1191, 1202-1219, 1293-94). Based upon extractor and ejector marks found on some of the casings, the criminalist believed that some of the cartridge casings had been extracted and some had been ejected from that firearm (Tr. 1184, 1185-87, 1191, 1202-1219, 1293-94). Only through David's illegal seizure were the officers able to gain access to the car's contents. The evidence found in it must, therefore, be suppressed, for "evidence discovered and later found to be derivative of a Fourth Amendment violation must be excluded as fruit of the poisonous tree." ***State v.***

Miller, 894 S.W.2d 649, 654 (Mo. banc 1995); ***State v. Sund***, 215 S.W.3d at 725. *In accord*, ***Wong Sun v. U.S.***, 371 U.S. 471 (1963).

The trial court erred when it overruled the Motion to Suppress Physical Evidence and when it allowed the State to introduce evidence concerning David's possession of the alleged murder weapon and other contents of his car. David's convictions should be reversed and his case remanded for a new trial without the illegally-seized evidence. ***State v. Barks***, 128 S.W.3d 513, 518 (Mo.banc 2004).

III.

The trial court erred in overruling David's Motion to Suppress Physical Evidence and his objections during trial to the introduction of evidence seized from his apartment as the result of the execution of a search warrant, because this denied David his right to be free from unreasonable searches and seizures, as guaranteed by the 4th and 14th Amendments to the United States Constitution and Article I, § 15 of the Missouri Constitution, in that the affidavit used to obtain the search warrant for David's apartment did not establish probable cause that there was a fair probability that contraband or evidence of a crime would be found in the apartment.

Facts

David filed a pretrial motion to suppress physical evidence, including any evidence seized from his apartment as the result of a search warrant (LF138-41). The motion asserted that the affidavit supporting the search warrant failed to establish probable cause and violated David's constitutional rights under the Fourth Amendment to the United States Constitution, and Article I, § 15 of the Missouri Constitution (LF138-41).

At a hearing on that motion to suppress, the following evidence was presented regarding this issue.

During the early morning hours of December 28, 2009, Angela and Rodney Gilpin were discovered shot to death at their apartment building in Jefferson City,

Missouri (Tr. 63). Later that morning, a Jefferson City detective prepared a search warrant application for David's apartment (Tr. 63-64; Motion Exhibit No. 2). That application contained these allegations:

1) A neighbor recorded a phone message from David that had "a hostile tone that is threatening toward A. Gilpin [Angela], the female victim";[25] 2) David lived in an apartment building adjacent to the victims' apartment; 3) the landlord said that Angela had sent him a letter that "made him aware of threats from David" and that Angela wanted to move because she was afraid of David; 4) Angela had obtained an *ex parte* order of protection against David; 5) the landlord told David that he wanted him to move out of the apartment complex; 6) David had a 1993 felony conviction for battery; and 7) David had been terminated from a job at Budweiser Inn because he "had been harassing and stalking" Angela, who had been a customer at the Inn (Motion Exhibit No. 2; Tr. 66-69).

The affidavit also stated that during the early morning hours of that day, Angela and Rodney had been shot to death in their apartment building and that there were a number of 9-millimeter cartridges in the common area hallway (Motion Exhibit No. 2). The search warrant authorized officers to search for and seize the following items: "Pistol, ammunition, receipts for the same, letters and notes related to A. Gilpin the victim from 1100 West High Street, Apt 2, Jefferson City, Missouri" (Motion Exhibit No. 2).

[25] The detective did not listen to that tape (Tr. 68).

At trial, there following testimony was presented about the search of David's apartment. At about 8:15 a.m., officers executed the search warrant at David's apartment (Tr. 1019-20, 1026).[26] No one answered the door, and the officers gained entry using a key provided by the apartment owner (Tr. 1019-20). Inside the apartment was a gun safe, which contained some ammunition, including 9-millimeter ammunition, a receiver for a long gun, and an owner's manual for a rifle (Tr. 1020-23, 1025-27, 1029, 1031). An empty 9-millimeter box of shells was on top of the safe (Tr. 1021, 1026, 1029, 1031). Inside a wooden chest was a schematic or paper template for a STEN 9-millimeter submachine gun, which could be used to manufacture a weapon that would fire 9-millimeter ammunition (Tr. 1021, 1023, 1026-28, 1030, 1039, 1303, 1305-06). On top of the kitchen trash can were two empty packages for speedloaders for a .38 Special and a .357 revolver; speedloaders allow the rapid loading of ammunition into a weapon (Tr. 1021-22, 1025, 1027-1028). A plastic bag containing spent ammunition was in the common living area (Tr. 1038). Officers did not find a 9-millimeter handgun (Tr. 1039).

After the suppression hearing, David argued that the officers did not have probable cause when they sought the search warrant – they only had a vague history of a relationship between David and Angela, and none of the affidavits set

[26] David renewed his objection to the search, and he was allowed a continuing objection (Tr. 1031).

out any specific threats, nor did they set out a time frame of when that kind of behavior occurred (Tr. 104-05).

The trial court overruled the motion to suppress (LF 12).

In David's motion for new trial, he alleged, in part, that the trial court erred when it overruled David's continuing objection and allowed introduction of testimony, photographs, and physical evidence of items unlawfully seized from David's apartment (LF 432-433; claim 18). Therefore, this issue is preserved for appeal. ***Rule 29.11***.

Standard of Review

In reviewing the propriety of the trial court's ruling on a motion to suppress, the facts, and reasonable inferences arising therefrom, are to be stated favorably to the order challenged on appeal. ***State v. Burkhardt***, 795 S.W.2d 399, 404 (Mo.banc 1990). When the motion to suppress is based upon an insufficient warrant, this Court gives great deference to the initial judicial determination of probable cause made at the time of the issuance of the warrant, and reverses only if that determination is clearly erroneous. ***State v. Berry***, 801 S.W.2d 64, 66 (Mo.banc 1990).

Constitutional provisions involved

Both the United States and Missouri Constitutions protect citizens from unreasonable searches and seizures.

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." ***U.S. Const., Amend. IV***.[27]

Likewise, the Missouri Constitution ensures "[t]hat the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation." ***Mo. Const., Art. I, Sec. 15***.

Search warrant affidavit did not show probable cause to search David's home

The neutral magistrate issuing a search warrant must determine probable cause from the totality of the circumstances and must make a "practical commonsense decision whether . . . there is a fair probability that contraband or evidence of a crime will be found." ***Illinois v. Gates***, 462 U.S. 213, 238 (1983). That decision is to be made based upon all the circumstances set out in the affidavit including the "basis of knowledge" and "veracity" of persons providing

[27] The Fourteenth Amendment extends this protection to prosecutions by the states. ***Mapp v. Ohio***, 367 U.S. 643 (1961).

the hearsay information. ***Id***. In reviewing whether the issuing judge was clearly erroneous, this Court looks to the four corners of the affidavit in support of the search warrant. ***State v. Laws***, 801 S.W.2d 68, 70 (Mo.banc 1990).

While this Court must give the issuing judge's initial determination "great deference," the judge does not have unbridled discretion. As noted in ***State v. Hammett***, 784 S.W.2d 293 (Mo.App. E.D. 1989), an affidavit must provide the issuing judge with a *substantial* basis for determining the existence of probable cause. ***Id***. at 295. In addition, that substantial basis must exist *before* the search warrant is issued, and not afterwards with the benefit of 20-20 hindsight. ***Id***. That substantial basis must include the "veracity" and "basis of knowledge" of persons supplying hearsay information. ***Id***. at 296. And it must be contained within the application and/or supporting affidavits since the issuing judge may not consider oral testimony in determining whether there is probable cause to issue the search warrant. ***State v. Gordon***, 851 S.W.2d 607, 612 (Mo.App.S.D. 1993).

Here, the search warrant affidavit was deficient. The affidavit said that "[a] neighbor" recorded a phone message from David that had "a hostile tone that is threatening toward A. Gilpin [Angela], the female victim" (Motion Exhibit No. 2). But the affidavit did not identify the neighbor or give anything to substantiate the veracity of the neighbor. It did not allege that any officer had listened to the message. It did not allege when the recording had been made. And, it did not allege any statements that were made such that it could be determined why the message was deemed threatening.

The affidavit also alleged that "the landlord" said that Angela had sent him a letter that "made him aware of threats from David" and that Angela wanted to move because she was afraid of David (Motion Exhibit No. 2). But the affidavit did not set out when the alleged threats had been made, in what manner Angela had received them,m or what had been said, written, or done from which Angela believed that David had threatened her.

The affidavit alleged that Angela had obtained an *ex parte* order of protection against David, but it did not allege when that had occurred (Motion Exhibit No. 2).

The application alleged that David had been terminated from a job at Budweiser Inn because he "had been harassing and stalking" Angela, who had been a customer at the Inn (Motion Exhibit No. 2). But it did not elaborate when the alleged harassing and stalking had occurred or how or from whom it had been determined that David had been harassing and stalking Angela at the Inn.

Thus, the search warrant affidavit did not show that there was a fair probability that officers would find in David's apartment: "Pistol, ammunition, receipts for the same, letters and notes related to A. Gilpin the victim from 1100 West High Street, Apt 2, Jefferson City, Missouri" (Motion Exhibit No. 2).

Because there was no basis in the affidavit supplied to the issuing judge for a finding of probable cause that in David's apartment were "Pistol, ammunition, receipts for the same, letters and notes related to A. Gilpin the victim from 1100 West High Street, Apt 2, Jefferson City, Missouri," the search of David's

apartment and seizure of items within that apartment was unconstitutional. The trial court clearly erred in overruling David's motion to suppress and in permitting the State to present at trial the evidence obtained during the illegal search and seizure.

David was prejudiced because the search of David's apartment turned up such evidence as: 9-millimeter ammunition; a receiver for a long gun; an owner's manual for a rifle; an empty 9-millimeter box of shells; knives; rifles; shotguns; a schematic or paper template for a STEN 9-millimeter submachine gun, which could be used to manufacture a weapon that would fire 9-millimeter ammunition; two empty packages for speedloaders for a .38 Special and a .357 revolver; and, a plastic bag containing spent ammunition (Tr. 1021-23, 1025-31, 1038-39, 1303, 1305-06). This Court should reverse David's convictions and remand for a new trial without the illegally seized items.

IV.

The trial court abused its discretion in overruling David's objections and allowing the State to parade testimony and evidence concerning numerous weapons and ammunition unrelated to the murder for which David was being tried, because this denied David his rights to due process, a fair trial, and to be tried for the offense with which he is charged, as guaranteed by the 6th and 14th Amendments to the United States Constitution and by Article I, §§ 10 and 18(a) of the Missouri Constitution, in that these weapons and ammunition were not directly connected to the murder, were inherently prejudicial, and had no probative value since they could not assist the jury in deciding any of the issues presented in the case because the evidence was uncontroverted that the murder weapon fired 9-millimeter ammunition, and thus David's possession of weapons and ammunition that could not have been involved in the murder were neither logically nor legally relevant and served only to color David's character as someone tending to possess dangerous weapons.

Introduction

The State introduced into evidence fifteen firearms that were found in David's car when he was stopped and arrested in Oklahoma. Only one of these firearms possessed by David could have been used to commit the charged murders, and none of the boxes of ammunition could have been. Yet the State

introduced all of them into evidence even though this Court has long identified the unfair prejudice of introducing weapons not connected to the crime, reasoning that the sight of deadly weapons "tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence." E.g., ***State v. Wynne***, 353 Mo. 276, 182 S.W.2d 294, 299-300 (1944) and ***State v. Anderson***, 76 S.W.3d 275 (Mo.banc 2002) (defendant charged with robbery and armed criminal action - a brochure of a handgun found in the defendant's home was not legally relevant and unfairly prejudiced him). A new trial is warranted.

Preservation

Prior to trial, David filed a motion *in limine* to prohibit evidence that law enforcement officers found numerous firearms in his car when he was arrested (LF 159). The motion noted that the State had endorsed a ballistics expert to testify that empty cartridges found at the murder scene could have been fired from a STEN submachine gun found in David's car (LF 159). Thus, any testimony or evidence concerning David's possession of other guns was irrelevant and highly prejudicial during the guilt phase, and it was also evidence of uncharged crimes since David was a convicted felon at the time he possessed the guns (LF 159).

At trial, the State presented evidence about these other firearms, which were found when David was stopped in Oklahoma by law enforcement officers. In the front passenger compartment, officers found a STEN submachine gun, three other firearms, a fully loaded magazine that would go to the STEN, two speedloaders for a .38 revolver, an ammo can with about 400 rounds of

ammunition, and a green duffel bag (Tr. 1066-68, 1070-71, 1076, 1078, 1086-87, 1096, 1108, 1114-15). Among the items in the green duffel bag were a pistol holder, 12 or 14 gun magazines that were fully loaded with each magazine holding 30 rounds, a bandoleer with ammunition in it, a "leather sleeve with magazine and ammo," two clips, and 17 boxes and one bag of ammunition (Tr. 1069-70, 1076-78, 1087-89). The ammunition were .38 special, 30-06, Winchester shotgun 12-gauge, Winchester shotgun 16-gauge, Remington 16-gauge shotgun, 30 carbine, 16-gauge shotgun shells, .22 long rifle, 308 Winchester rifle rounds, .410 shotgun shells, .22 shells, and .32 automatic (Tr. 1091-94). In contrast to this ammunition, the expended cartridge cases found at the murder scene were each 9-millimeter caliber (Tr. 1204-05).

A knife was found on the driver's side between the door and the seat (Tr. 1082). In the back seat was a bulletproof vest or body armor (Tr. 930, 1072, 1102-03). Under a blue blanket in the rear seat were two loaded rifles and a loaded shotgun (Tr. 1073). In the trunk of the car were camouflage clothing, an ammo can, and another green duffel bag (Tr. 1074, 1109). Inside that duffel bag were eight "long guns" (Tr. 1074-75).

Thus, aside from the STEN, there were 14 other firearms in the car: High Standard .22 revolver; 1910 .32-calbier pistol; Smith and Wesson .38 Special; Remington model 742; Ithaca .22 lever action; Stevens model 59A; LC Smith side-by-side shotgun; SKB 12-gauge shotgun; Stevens .22; Springfield .22 automatic; unknown make rifle with scope; Mosin Nagant rifle; US Springfield

model 1903; and Remington model 03-A3 (Tr. 1055-56, 1083-84; State's Exhibit Nos. 225-238). There was no 9-millimeter handgun (Tr. 1144). But the STEN machine gun could fire 9-millimeter shells (Tr. 1150). All of the weapons were loaded except for the STEN submachine gun (Tr. 1067, 1097-1101). The jury was shown enlarged photographs of the weapons on a screen in the courtroom (Tr. 1085).

David objected to the State presenting evidence about the other guns found in his car (Tr. 1059-60, 1084-85; State's Exhibit Nos. 103, 108-10, 123, 125, 126, 132, 133). He asserted that the evidence was not relevant, was evidence of uncharged crimes, was bad character evidence, and was being introduced by the State solely to inflame the passions of the jury (Tr. 1060-61, 1063, 1085). The trial court overruled the objections and allowed a continuing objection (Tr. 1061, 1063).

In David's timely motion for new trial, he included a claim that the trial court abused its discretion in overruling his objections to testimony and other evidence concerning firearms and ammunition seized from his car, including State's Exhibits Nos. 103, 108, 109, 110, 123, 125, 126, 132, 133, 239, 240, 241, 243-52, 283) (LF 447; claim 37). The motion again argued that none of the firearms and ammunition (other than the STEN) were proven to be linked to the murders and thus were irrelevant, and any relevance was greatly outweighed by its prejudicial effect (LF 447). Moreover, this evidence was evidence of uncharged

bad acts since they were potential evidence of both state and federal crimes (LF 447). This issue is preserved for appeal. ***Rule 29.11***.

Standard of Review

This Court reviews the trial court's admission of evidence for an abuse of discretion. ***Anderson***, 76 S.W.3d at 276. In matters involving the admission of evidence, this Court reviews for prejudice and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. ***Id***. at 277. Although courts frequently say that the admissibility of evidence is within the discretion of the trial court, while true in many instances, it is not accurate where an evidentiary principle or rule is violated, especially in criminal cases. ***State v. Walkup***, 220 S.W.3d 748, 756 (Mo.banc 2007). Evidentiary decisions of the trial court are reviewed, in the context of the whole trial, to ascertain whether the defendant received a fair trial. ***Id.*** at 757.

The admission of 14 firearms and more than 17 boxes of ammunition that could not have been used to commit the murders were not legally relevant

For physical evidence to be admissible in a criminal trial, it must be connected with both the crime and the defendant. ***State v. Gallimore***, 633 S.W.2d 232, 235 n.5 (Mo.App.W.D. 1982). When the physical evidence is a weapon, the courts of Missouri "with notable consistency have recognized that weapons unconnected with either the accused or the offense for which he is standing trial

lack any probative value and their admission into evidence is inherently prejudicial and constitutes reversible error." ***State v. Grant***, 810 S.W.2d 591, 592 (Mo.App.S.D. 1991), *quoting* ***State v. Perry***, 689 S.W.2d 123, 125 (Mo.App.W.D. 1985).

The admissibility of evidence requires both logical and legal relevance to the offense for which the defendant is standing trial. ***Anderson***, 76 S.W.3d at 276. "Evidence is logically relevant if it tends to make the existence of a material fact more or less probable." ***Id***. But logically relevant evidence is admissible only if legally relevant. ***Id***. "Legal relevance weighs the probative value of the evidence against its costs - unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." ***Id***. Logically relevant evidence is excluded if its costs outweigh its benefits. ***Id***. "A conviction may be reversed when a weapon admitted into evidence is unconnected to the crime and not similar to the weapon involved in the crime." ***State v. Black***, 50 S.W.3d 778, 786 (Mo. banc 2001), *citing* ***Wynne***, 182 S.W.2d at 300; ***Perry***, 689 S.W.2d at 125; and ***Grant***, 810 S.W.2d at 592.

This Court has long identified the unfair prejudice of introducing weapons not connected to the crime. ***Anderson***, 76 S.W.3d at 277. "'First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the

accused with the atrocity without sufficient evidence.'" ***Id***., *quoting* ***Wynne***, 182 S.W.2d at 299-300.

In ***State v. Holbert***, 416 S.W.2d 129, 132-33 (Mo. 1967), this Court found it to be reversible error to introduce in evidence two guns found in Holbert's possession when he was arrested on a charge of carrying a third gun as a concealed weapon. This Court held that the other guns were evidence of other offenses, and that they were not legally relevant to the crime charged since they were in no way connected with the charged offense. ***Id***.

In ***State v. Krebs***, 106 S.W.2d 428 (Mo. 1937), a case involving an armed robbery, the State was allowed to present testimony that when Krebs was arrested a revolver and rifle were found on or near him. No evidence had been presented that a rifle had been used in the robbery, nor was there any evidence that the revolver found on Krebs at the time of the arrest resembled in any way the one used during the robbery. ***Id***. at 428-29. This Court noted that if a weapon found on the defendant at the time of arrest was the one used during the crime, or similar to it, then that fact would be competent. ***Id***. at 428. But evidence that Krebs had in his possession weapons that were not connected with the charged crime was of no probative value in connecting him with the robbery. ***Id***. at 429. This Court reversed for a new trial because of the error in admission of the evidence. ***Id***.

In ***Perry***, 689 S.W.2d at 124-25, the appellate court reversed a conviction where the prosecutor introduced into evidence a shotgun in a case where the crime had been committed with a handgun. The police found the shotgun wrapped in a

blanket in the back seat of a car in which the defendant was a passenger. ***Id***. It was clear that the crime charged had been perpetrated by a handgun. ***Id***. at 125. Thus, the shotgun had no conceivable relevance and served only to color the defendant's character as someone tending to possess dangerous weapons. ***Id***. at 126.

Here, the murder weapon fired 9-millimeter ammunition (Tr. 1204-05). Thus, evidence of David's possession of the STEN submachine gun and the magazines that went with that gun were admissible. But his possession of other firearms that did not fire such ammunition and evidence of other types of ammunition was not legally relevant to the charges. Under the reasoning of this well-established line of cases in Missouri, the trial court abused its discretion in allowing the State to present evidence and testimony concerning these unrelated weapons and ammunition.

The trial court's erroneous admission of evidence can violate a defendant's due process rights. ***State v. Barriner***, 34 S.W.3d 139 (Mo.banc 2000). In determining prejudice, the mer evidence of guilt is not the test. ***State v. Douglas***, 131 S.W.3d 818, 825 (Mo.App.W.D. 2004). Further, the inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. ***Sullivan v. Louisiana***, 508 U.S. 275, 279 (1993). *Also see*, ***Kotteakos v. United States***, 328 U.S. 750, 763 (1946) ("[I]t is not the appellate court's function to determine guilt or innocence…Nor is it to

speculate upon probable reconviction and decide according to how the speculation comes out.").

Improperly admitted evidence should not be declared harmless unless it can be said to be harmless without question and the record demonstrates that the jury disregarded or was not influenced by the improper evidence. ***Grant***, 810 S.W.2d at 592. The admission of inadmissible evidence creates a presumption of prejudice. ***State v. Samuels***, 965 S.W.2d 913, 920 (Mo. App. W.D. 1998). Error is presumed prejudicial unless it is not prejudicial beyond a reasonable doubt. ***Id***. This Court is required to assume that the jury considered the improperly-admitted evidence as it reached its verdict. ***State v. Robinson,*** 111 S.W.3d 510, 514 (Mo.App.S.D. 2003). This is particularly true with weapons not connected to the crime because such evidence introduces unfair prejudice into the trial. ***Anderson***, 76 S.W.3d at 277.

Clearly the State introduced these guns and ammunition to purposely influence the jury to fear that David was a dangerous person. That would make it easier for the jury to convict David. In ***Anderson***, this Court held that a brochure of a handgun was not as "overwhelming to the jury as introduction of a gun itself," but still found that it "unfairly prejudiced Defendant." 76 S.W.3d at 277. But in a 4-3 divided opinion, the majority found that the defendant was not denied a fair trial because the defendant had admitted guilt to the police and at trial as to participating in the robbery. Additionally, the brochure was "inconsequential at trial," in that the brochure was mentioned only once when it was admitted, in six words, as part of a package of papers, and only seven questions were asked of the

defendant about it. ***Id***. The 4-3 majority found no denial of a fair trial because "[t]he incidental references in this case to a one-page brochure are not nearly as prejudicial as the display of a weapon itself." ***Id***. at 278.

David's case is in stark contrast to ***Anderson*** because here there were no confessions, trial admissions of guilt, or eyewitness testimony, but there were pages-and-pages of testimony about the other firearms and ammunition that could not have been used to commit the murders. Instead of an "inconsequential" brochure, there were nine photographs of firearms that were shown to the jury, which are being filed with this Court (the appendix contains one photo).

The trial court abused its discretion in allowing these unrelated weapons and ammunition into evidence and thereby denied David's rights to due process of law and to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. David was prejudiced by the improper admission of these unrelated weapons and ammunition This Court should reverse David's convictions and remand for a new, fair trial.

V.

The trial court erred in overruling David's objections and in allowing the State to introduce evidence of a petition for an order of protection that Angela had filed against David, because the petition contained hearsay and denied David his right to confront and cross-examine all witnesses against him, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Article I, § 18(a) of the Missouri Constitution, in that David did not have a prior opportunity to cross-examine Angela about the petition, the hearsay statements contained within the petition were testimonial because they were given while there was no emergency in progress and were made for the purpose of establishing or proving past events potentially relevant to later criminal prosecution, and they were not admissible under the forfeiture by wrongdoing doctrine because the State did not show that David killed Angela to keep her from testifying.

Facts - Angela's petition for order of protection

When Angela was shot, a petition for an order of protection by Angela against David was in Angela's purse (Tr. 979-80, 987-88; State's Exhibit Nos. 57 and 200). David moved in limine to prohibit the State from adducing hearsay statements from Angela in that petition (LF156-57). The State argued that the letter was admissible under "forfeiture by wrongdoing" and it was relevant to show her "fear of who is going to kill her" (Tr. 127).

In support of that argument, the State filed a Motion to Allow Hearsay Statements of Victim Due to Defendant's Forfeiture of his Confrontation Rights by his Own Wrongdoing (LF245-95). That motion, in part, indicated the State's intention to offer into evidence statements from Angela's petition for an order of protection (LF245-49). It argued that David had "forfeited his right to confrontation by harassing and threatening the victim and then subsequently murdering the victim" (LF246).

The court ruled that it would "allow limited statement made by the victim under the exception to the hearsay requirement" including the "*ex parte* application to the court" (LF 309). At trial, the court again ruled that the State would be allowed to introduce into evidence the petition for an order of protection; the court reasoned that it was admissible because "that's under oath" (Tr. 836-37). David renewed his objection to the petition (Tr. 955, 980, 988). The court overruled the objection and allowed a continuing objection (Tr. 988).

The petition was initially not passed to the jury (Tr. 988-99). But during closing argument, the prosecutor read part of it to the jury:

> "Ex-lovers. He knows everywhere I go, who I go with, who comes to my home, and is harassing me, calling JCPD for no reason." #8 "He stalks me every day, has called JCPD on me Saturday – or S-a-t, period, Monday."

(Tr. 1403).

David's motion for new trial alleged that the trial court erred in overruling his objection to the *ex parte* petition for order of protection found in Angela's

purse (State's Exhibit No. 200) (LF438; claim 29). This claim is properly preserved for appellate review. ***Rule 29.11***.

Standard of Review

This Court generally reviews a trial court's decision to admit hearsay testimony for an abuse of discretion. ***State v. Bell***, 950 S.W.2d 482, 484 (Mo.banc 1997). But whether admission of challenged testimony violates the Confrontation Clause is a question of law, which this Court reviews *de novo.* ***State v. Justus***, 205 S.W.3d 872, 878 (Mo.banc 2006).

"Properly preserved confrontation clause violations are presumed prejudicial." ***Id***. at 881. This Court will uphold the trial court's ruling only if the error was "harmless beyond a reasonable doubt." ***Id***. (citation omitted). "Harmless error is demonstrated 'only if there could be no reasonable doubt that the error's admission failed to contribute to the jury's verdict.'" ***Id***. (citation omitted).

David's constitutional right to confrontation was violated because the petition for an order of protection was testimonial

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . ." ***U.S. Const. Amend. VI***. The Sixth Amendment is applicable to criminal proceedings in state courts through the Fourteenth Amendment. ***Pointer v. Texas***, 380 U.S. 400, 406 (1965). The Missouri

Constitution provides, in addition, that "in criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face. . . ." ***Mo. Const., Art. I, § 18(a)***.

Hearsay is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value. ***State v. Sutherland***, 939 S.W.2d 373, 376 (Mo.banc 1997). "The essential principle of the hearsay rule is to secure trustworthiness of testimonial assertions by affording the opportunity to test the credit of the witness, and it is for this reason that such assertions are to be made in court subject to cross-examination." ***State v. Kirkland***, 471 S.W.2d 191, 193 (Mo. 1971).

In ***Crawford v. Washington***, 541 U.S. 36, 53-54 (2004), the United States Supreme Court held that the Confrontation Clause does not allow the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify (Angela was not) *and* the defendant had had a prior opportunity for cross-examination (David did not). If the statement is found to be testimonial, the Sixth Amendment demands what the common law required - in-court confrontation or unavailability and a prior opportunity for cross-examination. ***Id***. at 68. The core class of testimonial statements includes affidavits. ***Id***. at 51-52. A statement is testimonial if it is given while there was no emergency in progress and is made for the purpose of establishing or proving past events potentially relevant to later criminal prosecution. ***Davis v. Washington***, 547 U.S. 813, 822, 829 (2006).

In this case, Angela executed a petition (i.e., an affidavit) for use in an *ex parte* court proceeding, and given the nature of the statements and petition, an objective witness would reasonably believe that potentially the statement would be used at a later trial. Additionally, Angela's statements were not made in the context of an ongoing emergency in order to enable police to resolve that ongoing emergency. Instead, her affidavit described prior events and her own mental impressions– the very purpose of which was to establish or prove past events potentially relevant to later criminal prosecution. ***Davis***, 547 U.S. at 822. Although the immediate purpose of the affidavit was to obtain a protective order in a civil case, the facts recited were, nonetheless, potentially relevant to later criminal prosecution. ***Id***. Thus, the petition was testimonial and David was denied his right to confrontation since he never had the opportunity to cross-examine Angela about the contents of the petition.

After ***Crawford v. Washington***, the United States Supreme Court held in ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009), that affidavits related to forensic laboratory tests (certificates of analysis in that case) are testimonial. The Court noted that the certificates were plainly affidavits ("declaration before an officer authorized to administer oaths," *quoting* ***Black's Law Dictionary*** 62 (8th ed. 2004)), and were incontrovertibly a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Melendez-Diaz***, 557 U.S. at 310, *quoting* ***Crawford v. Washington***, 541 U.S. at 51. Thus, they fell within the

core class of testimonial statements requiring either (1) in-court confrontation or, (2) unavailability *and* a prior opportunity for cross-examination. ***Id***.

In ***Crawford v. Commonwealth***, 281 Va. 84, 704 S.E.2d 107 (2011), the Virginia Supreme Court held that an affidavit in support of a murder victim's petition for a preliminary protective order, which was made about three weeks prior to her death and set out her fear of the defendant and some threats he had made to her, was testimonial in nature and should not have been admitted against the defendant at trial. ***Id***. at 116. Because the victim was unavailable to testify at trial since she was deceased and the defendant did not have a prior opportunity to cross-examine the victim concerning her statements made in the petition, the defendant's Sixth Amendment right to confrontation was violated when the affidavit was admitted into evidence against him at the murder trial. ***Id***. at 116-17.

Angelia's affidavit and petition similarly were inadmissible and violated David's right to confrontation. The trial court ruled, erroneously, that the petition was admissible because it had been made "under oath" (Tr. 836-37). But the fact that it was "under oath" (i.e., an affidavit) is part of what made it fall within the core class of testimonial statements requiring either in-court confrontation or unavailability and a prior opportunity for cross-examination. ***Melendez-Diaz***, 557 U.S. at 310. And since the affidavit had been made for the purpose of establishing or proving some fact (David's harassing and stalking Angela), its admission violated David's right to confrontation. ***Id***.

The forfeiture by wrongdoing doctrine did not apply because there was no evidence that David killed Angela to prevent her from being a witness

The State did not assert that Angela's statements in her petition for order of protection fell within a hearsay exception, nor did it assert that its admission would not deprive David of his right to confront witnesses; rather, the State only asserted that Angela's statements were admissible under the forfeiture by wrongdoing doctrine (LF245-95).

Forfeiture by wrongdoing is an equitable principle that holds that if a witness is absent by the defendant's own wrongful procurement, then the defendant "cannot complaint if competent evidence is admitted to supply the place of that which he has kept away." ***State v. McLaughlin***, 265 S.W.3d 257, 271 (Mo.banc 2008), *quoting* ***Reynolds v. United States***, 98 U.S. 145, 158 (1878).

In ***Giles v. California***, 554 U.S. 353 (2008), the trial court allowed into evidence statements made by a murder victim to a police officer responding to a domestic violence call. The United States Supreme Court agreed that the forfeiture by wrongdoing doctrine constitutes an exception to the Confrontation Clause, but also held that for the doctrine to apply, the State must show that the defendant engaged in the wrongdoing *with the intent to prevent the witness from testifying*. ***Id***. at 361, 368. Thus, even if a defendant had no prior opportunity to cross-examine the declarant, testimonial hearsay may be admitted under the forfeiture by wrongdoing exception if the trial court finds, by a preponderance of the evidence,

that the defendant procured that declarant's absence with the intent to prevent the declarant from testifying against the defendant. ***Id.***, at 361–69.[28]

There was no evidence that David murdered Angela with the intent to prevent her from testifying. Nor was there any evidence that suggested that David's intent was to procure Angela's unavailability as a witness. In fact, there was no evidence that Angela was going to testify at any proceeding against David. This Court has held that when there is evidence of a defendant's intent to make the declarant unavailable as a witness in a domestic violence case, then evidence of a victim's statements about the defendant's attacks on her and comments to her comes squarely within the type of evidence ***Giles*** stated was admissible under the forfeiture by wrongdoing doctrine. ***McLaughlin***, 265 S.W.3d at 272-73.

In ***McLaughlin***, there was evidence that McLaughlin intended to make his victim unavailable as a witness in pending burglary and abuse cases. But there was no such evidence here. *See,* ***State v. Belone***, 295 Kan. 499, 502-04, 285 P.3d 378, 381-82 (2012) (The State did not show that Belone killed the victim for the purpose of preventing her from testifying at trial. At most, the evidence suggested that the killing was motivated by jealousy. Thus, the district court erred in

[28] But if a hearsay statement is nontestimonial, it does not implicate the Confrontation Clause, and the only consideration for the court is whether it may be admitted under one of the hearsay exceptions. ***State v. Robinson***, 293 Kan. 1002, 1024-25, 270 P.3d 1183, 1198-99 (2012).

admitting the victim's testimonial statements because the ***Giles*** requirements were not met).

Following ***Giles***, this Court must reverse the trial court's application of the forfeiture by wrongdoing doctrine because the State did not show that David killed Angela to keep her from testifying.[29]

Conclusion

Because the petition for order of protection was testimonial, and the forfeiture by wrongdoing doctrine did not apply, the trial court erred in allowing the State to introduce that petition into evidence over David's objection, violating David's right to confrontation and cross-examination. The State cannot show that this evidence was harmless beyond a reasonable doubt. The petition set out Angela's statement about her fear of David and his alleged actions such as: "…He knows everywhere I go, who I go with, who comes to my home, and is harassing me, …. He stalks me every day…" (Tr. 1403; State's Exhibit No. 200). The prosecutor read from that petition during its closing argument (Tr. 1403). Thus, the State cannot prove beyond a reasonable doubt that "the error's admission

[29] The trial court also made no finding that the State proved by a preponderance of the evidence that that David procured Angela's absence with the intent to prevent her from testifying against him. ***Giles***, 554 U.S. at 361–69. ***Crawford v. Commonwealth***, 704 S.E.2d at 123.

failed to contribute to the jury's verdict." ***Justus***, 205 S.W.3d at 881. David is entitled to a new trial.

VI.

The trial court abused its discretion in overruling David's objections and in allowing the State to introduce hearsay evidence of Angela's statements to Prenger about David and an alleged trespass by David into her apartment, and a letter she had written to Prenger detailing her fear of David, because this denied David due process and a fair trial as guaranteed by the 6th, and 14th Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the hearsay statements were not admissible under the forfeiture by wrongdoing doctrine because the State did not show that David killed Angela to keep her from testifying, and the State never claimed, and the trial court never found, that they qualified under any other hearsay exception.

Facts

Oral statements made by Angela to Prenger

Prior to trial, David moved in limine to prohibit the State from adducing hearsay statements from Angela Gilpin (the deceased) concerning the nature of her relationship with David and alleged bad acts committed by David, including oral statements she made to her apartment owner Dennis Prenger (LF156-57). The State argued that these statements were admissible under "forfeiture by wrongdoing" and were relevant to show her "fear of who is going to kill her" (Tr. 127-128).

In support of that argument, the State filed a Motion to Allow Hearsay Statements of Victim Due to Defendant's Forfeiture of his Confrontation Rights by his Own Wrongdoing (LF245-95). The State argued that David "forfeited his right to confrontation by harassing and threatening the victim and then subsequently murdering the victim" (LF246).

The court ruled that it would "allow limited statement made by the victim under the exception to the hearsay requirement including parts of the letter written to the landlord, *ex parte* application to the court, direct statements to the landlord" (LF 309).

At trial, David renewed his objection to hearsay statements from Angela, and the trial court allowed a continuing objection (Tr. 852-53).

Prenger testified that the month before Angela was killed, she told him that David had entered her apartment, so she was changing the dead bolt lock on her door (Tr. 852, 866-68, 871). Prenger spoke with David (Tr. 854). David told him that Angela had given him the keys to her apartment and he had used them to enter her apartment to take a gun away from her after she had threatened to kill herself (Tr. 854, 868-69). He gave the keys to Prenger (Tr. 854, 868).

Letter written by Angela to Prenger

David also moved to exclude a letter written by Angela to Prenger (LF191-92). The letter mentioned, among other things, that Angela had "filled [sic] for a

restraining order," that she was afraid of David, and that she did not "know what he will do next" (LF191-92; State's Exhibit No. 199A).

The State argued that the letter was admissible under "forfeiture by wrongdoing" and it was relevant to show her "fear of who is going to kill her" (Tr. 127). In support of that argument, the State filed its motion to allow Angela's hearsay statements based on the forfeiture by wrongdoing doctrine (LF245-95). That motion indicated the State's intention to offer into evidence the letter from Angela to Prenger (LF245-49).

At trial, David continued to object to the letter, and the trial court ruled that the State could introduce into evidence a redacted copy of that letter (Tr. 734, 836-840; State's Exhibit No. 199-A). David also objected to the redacted letter (Tr. 839-41). The trial court overruled the objection and allowed a continuing objection (Tr. 841-42). Later, David renewed his hearsay objection to the letter (Tr. 856).

A week before the murders, Prenger received a letter from Angela (Tr. 856-857; State's Exhibit No. 199-A). The redacted letter read:[30]

> Dear Dennis,
>
> This is Angie Gilpin, 1100 W. High apt. 2. I am writing you, to inquire as to weather (sic) you may have any other apartment rentals anywhere else in town. I can no longer live next door to Dave Hosier…. I have gone to the Court House and filled (sic) for a restraining order. …

[30] The ellipses indicate where the redacted parts were.

Anyway, If you have anything else, I would be interested in looking. I have liked my apartment, and renting from you. I'm sorry for all the B.S. Believe me, he scares me. I don't know what he will do next.

Sincerely,

Angie

(State's Exhibit No. 199A)

The next day, Prenger wrote to Angela that he had asked David to be out of his apartment by the end of the month, and he asked Angela to stay (Tr. 857-58).

Motion for new trial

David's motion for new trial alleged that the trial court erred in overruling his objections to hearsay statements of Angela, and the letter written to Prenger by Angela (State's Exhibit No. 199A) (LF421-26, 434-35claims 11, 12, 23). This claim is properly preserved for appellate review. ***Rule 29.11***.

Standard of Review

This Court reviews a trial court's decision to admit hearsay testimony for an abuse of discretion. ***State v. Bell***, 950 S.W.2d 482, 484 (Mo.banc 1997). "Courts in this state frequently say that the admissibility of evidence is within the discretion of the trial court. That is true, in many instances, but is not accurate where an evidentiary principle or rule is violated, especially in criminal cases." ***State v. Walkup***, 220 S.W.3d 748, 756 (Mo.banc 2007) (citation omitted).

This Court will uphold the trial court's ruling only if the error was "harmless beyond a reasonable doubt." ***State v. Justus***, 205 S.W.3d 872, 881 (Mo.banc 2006). (citation omitted). "Harmless error is demonstrated 'only if there could be no reasonable doubt that the error's admission failed to contribute to the jury's verdict.'" ***Id***. (citation omitted).

Hearsay

Hearsay is evidence of an out-of-court statement offered to prove the truth of the matter asserted. ***State v. Skillicorn***, 944 S.W.2d 877, 884 (Mo.banc 1997). Hearsay evidence is objectionable because the person who made the offered statement is not under oath or subject to cross-examination. ***State v. Mozee***, 112 S.W.3d 102, 107 (Mo.App.W.D. 2003). Hearsay is generally inadmissible unless it falls within a recognized exception. ***Skillicorn***, 944 S.W.2d at 884 "[T]he underlying rationale for the hearsay rule is that for the purpose of securing trustworthiness of testimonial assertions, and of affording the opportunity to test the credit of the witness, such assertions are to be made in court, subject to cross-examination." ***State v. Harris***, 620 S.W.2d 349, 355 (Mo.banc 1981).

Angela's oral statements to Prenger were hearsay. They were out-of-court and they were offered to prove the truth of the matters asserted: David had entered Angela's apartment without her permission (Tr. 852, 866-68, 871).

Angela's letter to Prenger was also hearsay. It contained out-of-court statements that were offered to prove the truth of the matters asserted: "he scares me. I don't know what he will do next." (State's Exhibit 199A).

Forfeiture by wrongdoing doctrine

The State in this case did not assert that Angela's prior statements to Prenger (verbally and in writing) fell within a hearsay exception; rather, the State only asserted that Angela's statements were admissible under the forfeiture by wrongdoing doctrine (LF245-95).[31]

Forfeiture by wrongdoing is an equitable principle that holds that if a witness is absent by the defendant's own wrongful procurement, then the

[31] The statements were not admissible under the state of mind hearsay exception since David's defense was that he did not do it, and thus Angela's state of mind was not relevant to the defense. *See*, ***State v. Bell***, 950 S.W.2d 482, 484 (Mo.banc 1997); ***State v. Post***, 901 S.W.2d 231 (Mo.App.E.D. 1995) (victim's statements that she wanted to divorce the defendant were *not* admissible under the state of mind exception because her state of mind was not relevant to the defense); and, ***State v. Rios***, 234 S.W.3d 412, 422-426 (Mo.App.W.D. 2007) (victim's statements were not relevant where the defendant denied any participation in the murder). Perhaps that is why the State only chose to argue admissibility under the forfeiture by wrongdoing doctrine.

defendant "cannot complaint if competent evidence is admitted to supply the place of that which he has kept away." ***State v. McLaughlin***, 265 S.W.3d 257, 271 (Mo.banc 2008), *quoting* ***Reynolds v. United States***, 98 U.S. 145, 158 (1878).

In ***Giles v. California***, 554 U.S. 353 (2008), the trial court allowed into evidence statements made by a murder victim to a police officer responding to a domestic violence call. The United States Supreme Court agreed that the forfeiture by wrongdoing doctrine constitutes an exception to the Confrontation Clause, but also held that for it to apply, the State must show that the defendant engaged in the wrongdoing *with the intent to prevent the witness from testifying*. ***Id***. at 361, 368.[32]

There was no such evidence here. Nor was there any evidence that suggested that David's intent was to procure Angela's unavailability as a witness. In fact, there was no evidence that Angela was going to testify at any proceeding against David. This Court has held that when there is evidence of a defendant's intent to make the declarant unavailable as a witness in a domestic violence case, then evidence of a victim's statements about the defendant's attacks on her and comments to her comes squarely within the type of evidence ***Giles*** stated was

[32] But if a hearsay statement is nontestimonial, it does not implicate the Confrontation Clause, and the only consideration before the court is whether it may be admitted under one of the hearsay exceptions. ***State v. Robinson***, 293 Kan. 1002, 1024-25, 270 P.3d 1183, 1198-99 (2012).

admissible under the forfeiture by wrongdoing doctrine. ***McLaughlin***, 265 S.W.3d at 272-73.

In ***McLaughlin***, there was evidence that McLaughlin intended to make his victim unavailable as a witness in pending burglary and abuse cases. But there was no such evidence here. Although Angela had filed a petition for an order of protection, there was no evidence that the order of protection had been granted and was still pending.[33] Thus, the forfeiture by wrongdoing doctrine did not apply. *See*, ***State v. Belone***, 295 Kan. 499, 502-04, 285 P.3d 378, 381-82 (2012) (The State did not show that Belone killed the victim for the purpose of preventing her from testifying at trial. At most, the evidence suggested that the killing was motivated by jealousy. Thus, the district court erred in admitting the victim's testimonial statements because the ***Giles*** requirements were not met).

Following ***Giles***, this Court must reverse the trial court's application of the forfeiture by wrongdoing doctrine because the State did not show that David killed Angela to keep her from testifying.[34] Because the forfeiture by wrongdoing

---

[33] The petition showed that a hearing had been set for September 24, 2009 – four days before the murder (State's Exhibit No. 199A). But the record does not show that the petition had been granted or that there were any other scheduled court proceedings.

[34] The trial court also made no finding that the State proved by a preponderance of the evidence that that David procured Angela's absence with the intent to prevent

doctrine did not apply, the trial court erred in allowing the State to introduce Angela's statement and letter into evidence over David's objection, violating David's right to confrontation.

The State cannot show that this evidence was harmless beyond a reasonable doubt. The letter set out Angela's statement about her fear of David: "he scares me. I don't know what he will do next. (State's Exhibit No. 199A). The prosecutor read this letter during its closing argument (Tr. 1402-03). In essence, the letter was used by the prosecutor to have Angela point the finger at David as her assailant. Thus, the State cannot prove beyond a reasonable doubt that "the error's admission failed to contribute to the jury's verdict." ***Justus***, 205 S.W.3d at 881. David is entitled to a new trial.

---

her from testifying against him. ***Giles***, 554 U.S. at 361–69. ***Crawford v. Commonwealth***, 281 Va. 84, 704 S.E.2d 107, 123 (2011).

VII.

The trial court erred in overruling David's motion for judgment of acquittal at the close of all the evidence as to Count III (burglary in the first degree, § 569.160), and in sentencing him for that offense, because the State did not prove his guilt beyond a reasonable doubt, thereby depriving him of his right to due process, as guaranteed by the 14th Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was no evidence that David unlawfully entered the apartment building.

Standard of Review & Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. ***In re Winship,*** 397 U.S. 358, 364 (1970).

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and inferences in a light most favorable to the verdict. ***State v. Botts***, 151 S.W.3d 372, 375 (Mo.App.W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). This Court may not supply missing evidence or give the State the benefit of unreasonable, speculative, or forced inferences. ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo.banc 2001).

This same standard of review applies when this Court reviews a motion for a judgment of acquittal. ***Botts***, 151 S.W.3d at 375.

David moved for judgment of acquittal after the evidence wherein he argued that there was no evidence that David knowingly entered the apartment building unlawfully; his motion was overruled by the trial court (LF 326-27; Tr. 1384-87). David's motion for new trial alleged that the trial court overruled the motion for judgment of acquittal at the close of all the evidence as to the burglary count because there was no evidence presented that David, or anyone else, unlawfully entered the apartment common area (LF454-55). Thus, this issue is properly preserved for appeal. *See* ***Rule 29.11(d).***

The State failed to prove an unlawful entry

David was indicted under Count III with burglary in the first degree under ***§ 569.160,*** which provides, in pertinent part, that a person commits that crime "if he knowingly enters *unlawfully* or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein." (emphasis added). Here, the verdict director charged that David knowingly entered unlawfully in an inhabitable structure owned and possessed by Dennis Prenger for the purpose of committing murder therein and that while he was in the inhabitable structure was armed with a deadly weapon (LF 351). Thus, the State had the burden of proving, beyond a reasonable doubt, that David not only knowingly entered the apartment building for the purpose of committing murder therein, but

also that his entry into the apartment building was unlawful. ***State v. Cooper***, 215 S.W.3d 123, 126 (Mo.banc 2007)

> "Enters unlawfully" under Chapter 569 is defined as:
>
> a person "enters unlawfully or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by other authorized person.

§ 569.010(8).

Assuming, arguendo, that David entered the apartment building, there was no evidence that he did so unlawfully.

It is true that Prenger testified that David no longer had Prenger's permission to enter that apartment building (Tr. 855). But David knew people in that apartment building, and thus the evidence does not preclude the fact that someone David knew who lived in that apartment building had let David into that building the night before or the morning of the shooting, again assuming for the purposes of this argument only that he was the person who shot the victims, which David does not concede. When officers arrived at the crime scene, the door to the building was locked and there were no signs of forcible entry (Tr.944-45). Thus, we do not know how entry was made and whether the entry was made unlawfully. When a person has the consent of a resident to enter a building, he is not guilty of

burglary, regardless of what other crimes he may later commit. ***Cooper***, 215 S.W.3d at 126.

The State did not prove a necessary element of burglary. Therefore, David's conviction and sentence for first degree burglary (Count III) must be reversed and he must be discharged as to that count.[35]

[35] Although reversal of this conviction will not matter if David's death sentence is affirmed, David believes that other points of this appeal entitle him to a new trial, so he is challenging the burglary conviction so that it will not be part of the charges of a new trial.

VIII.

The trial court abused its discretion in overruling David's objections to the note found in his car (State's Exhibit Nos. 104 and 223), and to testimony relating to that note, because the note was hearsay, not relevant, and the State failed to properly authenticate the note as having been written by David, violating David's right to due process and a fair trial as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution, in that the State failed to properly authenticate the note – there was no evidence that it was written by David, there was no timeframe when it was written, there was no signature on it, and it was not a self-authenticating document. Because the note was not shown to be written by David and it did not mention the victim, it was hearsay and irrelevant to the charged crime.

Facts and Preservation

In David's car, officers found a note that read:

> If you are going without [sic.] someone, do not lie to them, do not play games with them, do not fuck them over by telling other people things that are not true, do not blame them for things that they have not done. Be honest with them and tell them if there is something wrong. If you do not, this could happen to you. People do not like being fucked with, and after so much shit they can go off the deep end. Had to [sic] much shit!!!

(Tr.1056-61, 1067, 1081-82; State's Exhibit Nos. 104 and 223).

There was no date on the note. It was not signed. No one testified that the writing contained in the note was David's handwriting.

Prior to the notes admission into evidence, David objected that the note could not be authenticated, that no one would testify that it was written by David, there was no timeframe when it was written, there was no date on it, there was no signature, it was not a self-authenticating document, and it would be hearsay (Tr. 1058-59). The trial court overruled David's objection (Tr. 1059).

When the note was offered into evidence at trial, the trial court again overruled David's objection (Tr. 1081-82).

In David's timely motion for new trial, he alleged that the trial court abused its discretion in admitting the note into evidence and allowing a State's witness to read it to the jury (LF 442).

Standard of Review

A trial court has broad discretion in deciding whether to admit evidence and, as such, its decision will not be disturbed unless a clear abuse of discretion is shown. ***State v. Kriedler***, 122 S.W.3d 646, 649 (Mo. App. S.D. 2003). An abuse of discretion exists where it is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration. ***Id***.

Even if the trial court abuses its discretion in allowing the challenged evidence, David must show that it was reversible error to be entitled to appellate relief. ***Id***. To show such error, David must demonstrate not only that the admission of the challenged evidence was erroneous, but also that it was prejudicial. ***Id***.

The State never showed that the note was written by David

Hearsay is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value. ***State v. Sutherland***, 939 S.W.2d 373, 376 (Mo. banc 1997). The rule generally prohibiting hearsay is designed to protect a party from out-of-court declarations of other persons who cannot be cross-examined as to the bases of their perceptions, the reliability of their observations, and the degree of their biases. ***Kriedler***, 122 S.W.3d at 650.

A number of foundational requirements must be met before a document may be received into evidence, including relevancy, authentication, and hearsay." ***State v. Cravens***, 132 S.W.3d 919, 930 (Mo.App.S.D.2004) (authenticity of address book discovered in victim's trailer was not established as a writing that was authored by the victim, and thus the book was not admissible). The general rule is that the execution or authenticity of a private writing must be established before it is received into evidence. ***State v. Swigert***, 852 S.W.2d 158, 163 (Mo. App. W.D. 1993). "The authenticity of a document cannot be assumed, but what it purports to be must be established by proof." ***Id***. In fact, it is not sufficient for

purposes of establishing authenticity that the written document purports to have been written and signed by the person to whom it is attributed.

This note was hearsay and irrelevant evidence unless it was written by David. But it was never proven that he wrote it. Although it was in David's car, and was not shown when or how it got there, and certainly there was no evidence showing that he had written it. Because the State failed to prove the notes authenticity (i.e., that it was written by David), the note was hearsay and irrelevant. There was no date on the note. It was not signed. It did not mention the victim. There was no connection established to this crime, and the only connection to David was that it was found in his car.

The note was prejudicial and warrants a new trial. If the jury believed that David had written the note, it might have viewed the note as an admission by David's of his guilt. But it was not shown to be written by David, so it was not an admission, and it was not shown to have been written about the victim in this case, so it was irrelevant. A new trial must be ordered.

CONCLUSION

Because the searches of David, David's car, and David's apartment, and the seizures of items found there were unconstitutional (Points I, II, and III), this Court should reverse and remand for a new trial. Because of the improper admission of firearms and ammunition that were not connected to the charged crimes, this Court should reverse and remand for a new trial (Point IV). Because of the improper admission of the victim's statements contained in a petition for an order of protection (Point V), in a letter written to her landlord and oral statements made to him (Point VI), this Court should reverse and remand for a new trial. Because there was no evidence that David entered the apartment building unlawfully, this Court must reverse his burglary conviction under Count III and order him discharged as to that count (Point VII). Because of the erroneous admission of the note found in David's car, he is entitled to a new trial (Point VIII).

Respectfully submitted,

/s/ Craig A. Johnston

Craig A. Johnston, MOBar #32191
Assistant State Public Defender
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977
Fax: (573) 777-9974

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 26,433 words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

On this 1st day of July, 2014, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were delivered through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at shaun.mackelprang@ago.mo.gov.

/s/ Craig A. Johnston

Craig A. Johnston, MOBar #32191
Assistant State Public Defender
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977
Fax: (573) 777-9963
Email: Craig.Johnston@mspd.mo.gov